TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 322

PETE LURETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED JULY 30, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 322

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

INDEX.

	Original	Print
Record from D. C. U. S., Western District of Washington	1	1
Names and addresses of counsel (omitted in printing)	1	
Complaint	3	1
Exhibit "A"—Report and order of I. C. C., July 2, 1940, Docket No. MC-68618, etc.	12	7
Exhibit "B"—Order of I. C. C. modifying order of July 2, 1940, Docket No. MC-68618, etc.	35	25
Exhibit "C"—Order of I. C. C., October 16, 1937, granting certificate of public convenience and necessity, Docket No. MC34383	36	26
Exhibit "D"—Order of I. C. C., November 13, 1937, staying effective date of order, Docket No. MC-34383	37	27
Exhibit "E"—Telegram, Blanning to Stephan, January 6, 1941	38	28
Motion of I. C. C. for leave to intervene (omitted in printing)	39	
Answer of Interstate Commerce Commission	40	28
Answer of United States of America	48	33
First supplemental complaint	50	34

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1941.

	Original	Print
Record from D. C. U. S., Western District of Washington—Continued		
Order granting leave to file first supplemental complaint (omitted in printing)	56	
Order setting cause for hearing before three-judge court (omitted in printing)	57	
Plaintiff's Exhibits:		
1—Report and order of Interstate Commerce Commission with order denying application of plaintiff (omitted in printing)	59	
2—Order of Interstate Commerce Commission granting compliance authorization and subsequent order staying compliance authorization, 1937 (omitted in printing)	76	
3—Petition of Pete Lubetich to Interstate Commerce Commission, December 17, 1940 (omitted in printing)	81	
4—Proposed report of Joint Board No. 5 (omitted in printing)	91	
5—Petitioner's exceptions to proposed report (omitted in printing)	104	
6—Transcript of record of hearing before Interstate Commerce Commission, Docket MC 34383 (omitted in printing)	137	
Defendants' Exhibits:		
A-1—Copy of Interstate Commerce Commission Form BMC 1 (omitted in printing)	384	
A-2—Copy of Interstate Commerce Commission Form BMC 8 (omitted in printing)	389	
Opinion, Black, J.	393	36
Findings of fact and conclusions of law	399	40
Decree	403	43
Letter, Nelson Thomas to Hon. Lloyd L. Black, July 3, 1941 (omitted in printing)	404	
Petition for appeal (omitted in printing)	405	
Assignments of error	406	44
Order allowing appeal	420	46
Bond on appeal (omitted in printing)	421	
Notice of appeal	423	46
Order to transmit original record	425	47
Notice to attorney general of Washington (omitted in printing)	427	
Notice to attorney general of Oregon (omitted in printing)	428	
Condensed statement of proceedings at hearing before three-judge court	432	47
Docket entries (omitted in printing)	434	
Praecipe for original record	436	49
Clerk's certificate (omitted in printing)	410	
Citation (omitted in printing)	442	
Statement of points to be relied upon and designation of parts of record to be printed	443	52

[fols. 1-2] [File endorsement omitted]

[fol. 3]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 314

PETE LUBETICH, an Individual, Doing Business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT—Filed January 8, 1941

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division:

Comes now the above named plaintiff, and for his cause of suit against the defendant Alleges and Shows:

I

That plaintiff, Pete Lubetich, was and is an individual duly authorized to do business under and by virtue of the laws of the State of Washington as Pacific Refrigerated Motor Line with his principal place of business in Seattle, Washington; that said plaintiff and his predecessors in interest since prior to June 1, 1935, have been and are lawfully engaged in the business of transporting property for hire in interstate commerce as a common carrier of general commodities by motor vehicle between various points and places in the States of Washington, Oregon and California, and among other places, between Seattle, Washington, and Los Angeles, California; that said plaintiff is subject to regulation by the Interstate Commerce Commission.

II

That this suit is brought against the United States of America under an act of Congress approved October 22, 1913, known as the "Urgent Deficiencies Appropriations Act," 38 Stat. L. 219, to enjoin, set aside and annul [fol. 4] that certain order entered by the Interstate Com-

merce Commission (hereinafter called the Commission) on July 2, 1940, effective August 20, 1940 (and thereafter several times amended through and including an order of the Commission of December 31, 1940, extending the effective date of the order to January 10, 1941), in its proceeding known as "MC 34383, Pete Lubetich Common Carrier Application"; that a copy of said order of July 2, 1940, is appended hereto as Exhibit A; and that a copy of said last order of December 31, 1940, is appended hereto as Exhibit B.

III

That pursuant to the provisions of the Motor Carrier Act of 1935, as amended (Title II of the Transportation Act of 1940, 49 U. S. C.), and prior to February 12, 1936, plaintiff filed with the Commission his application under the so-called "grandfather" clause for a certificate of public convenience and necessity authorizing transportation of commodities generally between points and places in the States of Washington, Oregon and California; that said application was filed on Form BMC 1, which form was designated by the Commission to be used by common carriers claiming rights under the "grandfather" clause provisions of Section 206 of the above entitled act; that thereafter on October 16, 1937, the Commission issued its order, a copy of which is attached as Exhibit C, granting to plaintiff a certificate to transport general commodities between Seattle, Washington, and Los Angeles, California, serving certain designated intermediate and off-route points; that thereafter on November 13, 1937, upon petition of plaintiff the Commission issued a further order, a copy of which is attached as Exhibit D, which stayed the effect of the order set forth as Exhibit C; that thereafter on September 29 and September [fol. 5] 30, 1938, the Commission conducted a formal hearing on the application, and on August 25, 1939, a Joint Board of the Commission issued a report recommending denial of the application; that exceptions were duly filed by the plaintiff to this order, and on July 2, 1940, the Commission issued its order, hereinabove designated as Exhibit A, which denied said application, effective August 20, 1940.

IV

That meanwhile, on or about September 15, 1939, pursuant to the provisions of Section 206 (a) and 207 (a) of the

Motor Carrier Act, 1935, plaintiff filed an application for a certificate of public convenience and necessity on Form BMC 8, which form was designated by the Commission to be used by a common carrier seeking a certificate to continue operations or to institute new operations, other than claimed under the "grandfather" clause, to-wit: upon a showing of public convenience and necessity.

V

That said further public convenience and necessity application was designated by the Commission as its Docket No. MC 34383 (Sub. No. 1), and was dully assigned for hearing, and heard, by a Joint Board of the Commission at Seattle, Washington, on January 30 to February 2, 1940, and at Los Angeles, California, on March 19 and 20, 1940; that briefs were due and seasonably filed by all parties on May 10, 1940; that from that date up to and including the present time, no report or order has been issued by the Joint Board or by the Commission determining said application for a certificate of public convenience and necessity.

VI

That when the Commission's order under the "grand-
[fol. 6] father" clause in MC 34383 (which by its terms ordered a denial of the "grandfather" application effective August 20, 1940), was served on plaintiff, plaintiff duly petitioned the Commission to grant an extension of time of the effective date alleging that plaintiff would otherwise be irreparably injured if he was required to abandon his operations prior to determination of his pending application for a certificate of public convenience and necessity; that the Commission did grant such extension as prayed for a period of approximately sixty days to October 12, 1940; that prior to October 12, 1940, the Commission had not yet issued its report and order in the still pending application for a certificate of public convenience and necessity, and that therefore plaintiff again sought an extension of the effective date of the pending "grandfather" clause application, alleging that it would otherwise cause irreparable damage to plaintiff and that on October 11, 1940, the Commission granted a further sixty-day extension to December 12, 1940; that on December 12, 1940, no report had yet been issued by the Joint Board or by the Interstate

Commerce Commission in the pending application for a certificate of public convenience and necessity, but that on November 14, 1940, the Commission issued its order extending the effective date of the "grandfather" application to January 4, 1941; that on December 17, 1940, the plaintiff filed a petition again, alleging that as a matter of law and equity, it would suffer irreparable damage unless the Commission extended the effective date of its order until such time as there was a final determination of the still pending and undetermined application for a certificate of public convenience and necessity; that on December 31, 1940, the Commission extended the effective date to January 10, 1941; that on January 6, 1941, the Commission [fol. 7] advised plaintiff by telegram as follows:

"Commission has denied further postponement in MC 34383 and denial order is effective January 10. Any request for further postponement pending court proceeding will be considered only if made by Federal Judge."

A true copy of this telegram is attached as Exhibit E.

VII

That if said order of the Interstate Commerce Commission of December 31, 1940, becomes effective January 10, 1941, plaintiff will be required to discontinue operations conducted since prior to June, 1935, as a common carrier of general commodities by motor vehicle in interstate commerce between points in Washington, Oregon and California, notwithstanding the fact that there is still pending and undetermined before the Commission an application for a certificate of public convenience and necessity wherein plaintiff introduced extensive proof of the existence of such public convenience and necessity over the same routes and within the same territory; that the required discontinuance of his operations will result in irreparable damage to plaintiff even though subsequently at an indeterminate date the Commission should permit him to resume operations upon a finding of public convenience and necessity; that such irreparable damage will result through the loss of customers, the depreciation and decay of extensive motor vehicle equipment, the alternative choice of maintaining offices and terminals during a period of required inactivity, or alternately to continue to pay rent and other obligations while failing to use such terminals, and other damage.

VIII

The plaintiff avers and charges that said order of the Commission of December 31, 1940, denying to the plaintiff the right to continue to render services between the points named in said order was and is unreasonable, arbitrary, [fol. 8] and capricious, and was made and entered by the Commission arbitrarily and under misconceptions of law and is null and void and should be set aside for the following reasons:

(1) That the order is contrary to the law and the evidence;

(2) That the Commission erred and acted beyond the scope of its authority in making effective a final denial of an application under the "grandfather" clause which denies the plaintiff the right to continue long established operations while there is still pending on a record fully made a concurrent application wherein there has been offered all of the evidence of public and private interest that is implicit in an application based on public convenience and necessity;

(3) That the Commission misconceived its statutory powers and exceeded its jurisdiction and authority in proceeding to deny said application upon the sole theory of "grandfather" rights when plaintiff has made a claim before the Commission to have the Commission act outside the "grandfather" clause and determine the issue of public convenience and necessity.

IX

That if said order of the Commission herein complained of is permitted to become effective, it will cause the plaintiff grave and irreparable injury and damage of the nature hereinbefore and hereinafter set forth; that as further specific grounds for the issuance of a preliminary or interlocutory injunction against the enforcement of said order pending the determination of the merits of this cause and as further grounds for granting a permanent injunction herein, plaintiff alleges and shows in addition to the facts above shown the following:

(1) Said order of the Commission, modified as aforesaid to its present effective date of January 10, 1941, ex- [fol. 9] pressly denies plaintiff's application under the "grandfather" clause. This denial will require plaintiff

to discontinue his operations. If plaintiff refuses to compiy with said order of the Commission, such refusal will constitute a violation of Section 222 of the Motor Carrier Act, 1935, and will subject plaintiff to statutory penalties of $100.00 for the first offense and not more than $500.00 for any subsequent offense, each day of such violation being deemed a separate offense, and will expose plaintiff to separate actions by the United States for the recovery of said accruing penalties.

(2) The plaintiff has no plain, adequate, or complete remedy at law in the premises.

Wherefore, Plaintiff prays as follows:

(1) That this Court issue herein a preliminary or interlocutory injunction suspending and restraining the enforcement, operation and execution of said order of the Commission entered July 2, 1940 (as modified to become effective January 10, 1941), (copies of which are attached as Exhibits A and B of this complaint), insofar as same requires plaintiff to cease his operations as a common carrier by motor vehicle of general commodities in interstate commerce between points in Washington, Oregon and California, and that defendant, its officers and agents, be enjoined and restrained from enforcing or attempting to enforce said order pending the final determination of this cause.

(2) That upon final hearing a decree be entered setting aside and annulling and perpetually enjoining the enforcement of said order of the Commission so entered in MC Docket No. 34383, so far as same requires plaintiff to discontinue his operations as a common carrier by motor vehicle of general commodities in interstate commerce [fol. 10] between points in Washington, Oregon and California, and by such decree defendant, its officers and agents, be perpetually enjoined and restrained from enforcing or attemping to enforce said order.

(3) That plaintiff have such other and further relief as the nature of the case shall require and to this Court shall seem meet.

Albert E. Stephan, Northern Life Tower, Seattle, Washington, Attorney for Plaintiff.

[fol. 11] *Duly sworn to by Pete Lubetich. Jurat omitted in printing.*

[fol. 12] EXHIBIT A TO COMPLAINT

Interstate Commerce Commission

No. MC-68618 [1]

Los Angeles-Seattle Motor Express, Inc., Common Carrier Application

Submitted October 16, 1939. Decided July 2, 1940

1. Applicant in No. MC-68618, as successor in interest to Marie Hernych and J. J. Hendricks, found entitled to continue operations as a common carrier by motor vehicle of (a) general commodities, with exceptions, between Los Angeles, Calif., and Seattle, Wash., over regular routes, serving certain intermediate and off-route points; and (b) special commodities, between points in California and Washington, over irregular routes, because its predecessors were engaged in such operations on June 1, 1935, and it, or its predecessors, have been so engaged continuously since. Issuance of a certificate approved upon compliance with certain conditions, and application denied in all other respects.

2. Applicant in No. MC-34383, as successor in interest to Pete and John Lubetich, and applicant in No. MC-8522, as successor in interest to I. A. Taylor and A. Fornaciari, found not entitled under the "grandfather" clauses of sections 206 (a) and 209 (a) of the Motor Carrier Act, 1935, to a certificate of public convenience and necessity, or a permit, authorizing operation as a common carrier, or contract carrier, by motor vehicle, of general commodities, between points in California, Oregon, and Washington, over regular or irregular routes. Applications denied.

Henry T. Ivers for applicant in No. MC-68618.

E. K. Marohn and H. D. Williams for applicant in No. MC-34383.

E. N. Eisenhower and Chas. D. Hunter, Jr. for applicant in No. MC-8522.

---

[1] This report also embraces No. MC-34383, Pete Lubetich Common Carrier Application, and No. MC-8522, Williams Brothers, Inc., Common Carrier Application.

William B. Adams, Edward M. Berol, A. J. Clynch, Alfred A. Hampson, E. K. Marohn, Edwin C. Matthias, Richard B. Maxwell, Donald A. Schafer, and E. V. White, for protestants in No. MC-68618.

William B. Adams, R. H. Culbertson, A. A. Hampson, Henry T. Ivers, Thos. Maguire, Frank C. McColloch, and Donald A. Schafer for protestants in No. MC-34383.

William B. Adams, A. A. Hampson, Henry T. Ivers, Emmett G. Lenihan, Thos. Maguire, Frank C. McCulloch, and Donald A. Schafer for protestants, in No. MC-8522.

[fol. 13] Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

The three applications herein considered were heard separately and each was the subject of a separate recommended report and order by joint board No. 5. For reasons which are apparent from our discussion herein, these three applications will be discussed separately but disposed of in one report. Exceptions were filed by each of the applicants to the orders recommended by the joint board in their respective cases and protestants replied. Our conclusions differ somewhat from those recommended in No. MC-68618.

Applicant in No. MC-68618 opposed the other two applications and in turn its application was opposed by the other two applicants herein. In addition, numerous rail and motor carriers oppose all three applications.

No. MC-68618

By application filed February 11, 1936, under the "grandfather" clause of section 206(a) of the Motor Carrier Act, 1935, the Los Angeles-Seattle Motor Express, Inc.,[2] of Seattle, Wash. as successor in interest to Marie Hernych

---

[2] Substitution of Hendricks Refrigerated Truck Lines, Inc., as applicant in lieu of Marie Hernych and J. J. Hendricks was authorized May 18, 1937, in No. MC-FC 1430. On July 1, 1938, applicant's name was changed to Los Angeles-Seattle Motor Express, Inc.

and J. J. Hendricks, co-partners, seeks a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle of general commodities, except explosives, in interstate or foreign commerce, between points in California, Oregon, and Washington, over irregular routes, and also over a number of regular routes, which, in view of our conclusions herein, need not all be described.

[fol. 14] The operations to which applicant succeeded were begun in December 1932 by J. J. Hendricks and his sister, Marie Hernych, and were continued by them on a partnership basis until January 1937. At that time the operations were taken over by Hendricks Refrigerated Truck Lines, a corporation formed for that purpose by Hendricks and his sister, and the name of which, on July 1, 1938, was changed to that which it now bears—the Los Angeles-Seattle Motor Express, Inc. Applicant's predecessors were registered on May 4, 1935, under the N. R. A. Code of Fair Competition. Terminal facilities have been maintained at Los Angeles, Calif., and Seattle since the inception of the operations, and also, prior to June 1, 1935, at Portland and Medford, Oreg.

While applicant's and its predecessors' operations have been conducted in equipment both owned and leased, applicant voluntarily submitted proof only of those operations which have been performed solely in equipment of which it or its predecessors have been the owners.

Applicant's evidence describes movements allegedly representative of a total of some 18,000 shipments. Included among them are shipments described as "express", which consisted of commodities falling within the category of general merchandise, such as brass goods, stationery and office supplies, auto supplies, hardware, radios, furniture, woolens, advertising matter, etc. These express shipments were handled under an arrangement with one R. W. Lacey, who operated as the Los Angeles-Seattle Motor Express but who has since discontinued his operations [3] and is now both a stockholder in, and an employee of, applicant. The [fol. 15] arrangement with Lacey, which on March 27, 1936, was reduced to writing, provided in substance that on cer-

---

[3] The application of R. W. Lacey—No. MC-30103—for appropriate authority under the act was dismissed at his request on April 11, 1939.

tain days each week Lacey would deliver to applicant, or its predecessors, as the case might be, express matter in minimum lots aggregating not less than 4,000 pounds. Applicant and its predecessors transported this traffic from origin to destination, and agreed not to enter into any similar agreement directly or indirectly with any other person, firm, or corporation operating as a common carrier and publishing rates lower than those of Lacey. The express was handled under so-called master bills of lading, which were accompanied by expense bills covering each individual item in the shipments, as well as by an abstract of the expense bills. The expense bills were turned over to a distributing agent at the destination point.

Lacey had no motor carrier equipment with which to perform a transportation service; was not shown to have exercised control over applicant or its predecessors in respect to the performance of the physical transportation; and paid applicant or its predecessors their established charges for the transportation performed. Definitely, therefore, he was not a common carrier by motor vehicle within the purview of the act—Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211. Insofar as the agreement itself is concerned, there was nothing in it circumscribing applicant's or its predecessors' operations as independent carriers. Lacey's position in relation to them was simply that of a shipper. The mere existence of the written agreement did not constitute applicant or its predecessors contract carriers for, of course, all transportation is performed under agreements, written or oral. Patman Contract Carrier Application, 2 M. C. C. 194. It [fol. 16] is our conclusion, therefore, that the benefit of the transportation of the express items inure entirely to applicant, and such items should be viewed in the same light as any other commodities transported by applicant for other shippers.

Applicant's and its predecessors' transportation between Seattle and Los Angeles has been continuous since before June 1, 1935. Although the commodities carried southbound were not as varied as were those transported northbound, applicant contends that the joint board erred in finding that it should be restricted on its southbound movements to special commodities only. Protestants, on the other hand, contend that the finding of the joint board is correct.

The base load southbound was, and apparently still is, commodities requiring refrigeration, principally fish and fruits. However, applicant's predecessors also transported southbound, on or prior to June 1, 1935, one or more shipments of honey, chocolate, files, paper, express, poultry, woolens, powdered yolks, fish sausage, cut flowers, egg whites, truck cab, butter, and tubing, which commodities bear little or no relation to fish and fruits.

In Reliance Trucking Co., Inc., Contract Carrier Application, 4 M. C. C. 594, division 5 stated:

Nor do we require proof, in granting "grandfather" certificates to haul "general commodities", that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "grandfather" period consistent with the holding out of the natural and normal course of business. A mere holding out without evidence of the operation consistent therewith is not enough.

Applicant's claim that its predecessors held themselves out to transport general commodities is corroborated by the fact that they undoubtedly did transport general com- [fol. 17] modities, with certain exceptions hereinafter discussed, northbound, to which recommendation of the joint board protestants filed no exceptions, and also by the fact that they did transport southbound a number of commodities in addition to fish and fruits. However, the application itself excludes explosives and there is no showing that applicant or its predecessors ever transported certain commodities of a highly specialized nature, i.e., those of unusual value, commodities in bulk, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), and commodities requiring special equipment other than refrigeration. Considering the operation as a whole, there was clearly no limitation or restriction in the undertaking to transport, except as above described, in respect of the regular route operations, on June 1, 1935, and we see no reason for limiting the authority herein to special commodities in either direction.

In 1935 prior to June 1, in addition to those made from Seattle to Los Angeles, shipments were also made from Seattle to other California points, as follows: to San

Pedro in January, February, March, April, and May; to Long Beach during each month from January through May; to Hollywood in February, April, and May; to Fresno in January, February, and March; Sacramento in January, February, March, April, and May; Chico in January and May; Stockton in January, February, March, and May; Glendale in February and May; Redding in March; Terminal Island and Santa Monica in February; and to Wilmington in May. All of these points are located in the vicinity of Los Angeles or on the routes described in the appendix hereto. By reason of its showing in respect of movements to those points in California located on the routes in question, applicant is entitled to serve from [fol. 18] Seattle all intermediate points in California, as well as those described above which are not on the routes but fall within the category of off-route points. Compare Knaus Common Carrier Application, 20 M. C. C. 669, 671.

San Diego, Calif., is situated too far distant from Los Angeles to be termed an off-route point, System Arizona Exp. Service, Inc., Com. Car Application, 4 M.C.C. 129, 131. Therefore, the two shipments shown to it, one in January and the other in April, are insufficient to establish any right in applicant to operate to that point from Seattle. Only two movements are shown from Seattle to San Francisco, Calif.,—one of poultry in January and the other of butter in May. Considering the size of that city, applicant should have been able to show more movements to it than it has done, and accordingly it cannot be found entitled to serve San Francisco from Seattle, nor to operate over routes from Seattle to Los Angeles other than over those designated in the appendix.

Infrequent movements were also made from Portland, a shipment of auto parts moving to San Francisco in January, a shipment of a motor to Los Angeles in February, and a shipment of express to Los Angeles and of oysters to San Francisco in March. Considering the size of Portland, applicant's showing is insufficient to entitle it to any "grandfather" rights from that point. Aside from Portland, the only other point in Oregon from which movements originated prior to June 1, 1935, was Salem, and that involved but one movement.

Applicant's northbound traffic has moved principally from Los Angeles to Seattle, and prior to June 1, 1935, involved mainly shipments of express, although various

other commodities also were handled. Several shipments [fol. 19] moved in January, February, and March. In addition to movements to Seattle, several shipments of express were also made in January, March, and May, and one of advertising matter in May, from Los Angeles to Medford. Several shipments of express were handled to Portland in January, February, March, and May, and one of merchandise in January. Aside from these points, service from Los Angeles to other points in Oregon and Washington has been limited, other than in respect of fruits and vegetables, which will subsequently be discussed. Applicant will be authorized to transport general commodities, with certain exceptions, from Los Angeles to Seattle, Medford, and Portland, over the routes described in the appendix.

Shipments of fruits and vegetables emanated from numerous points in southern California and there is oral testimony that such shipments originated as far north as Merced. The shipments in question were destined to Seattle, Tacoma, Centralia, Olympia, Spokane, Bellingham, Aberdeen, and other points in Washington. Applicant, however, does not hold itself out to transport shipments to those points in Washington east of the Cascade Mountains, in lots of less than 10,000 pounds. Other than from Los Angeles to Portland no shipments of fruits or vegetables are shown on or prior to June 1, 1935, to any points in Oregon, except one of oranges to Salem. Applicant is entitled to continue the transportation of fruits and vegetables from points within the described area in California to points in Washington, over irregular routes.

Southbound movements, from Washington, of fruit or vegetables are shown from Spokane to Whittier, Calif., in May; from Yakima to Los Angeles in January and April; from Dryden to Los Angeles in January; and from Wenatchee to Los Angeles in February and May 1935. Applicant [fol. 20] is entitled to continue this transportation, over irregular routes, from points in Washington located in the area bounded on the north by U. S. Highway from the Washington-Idaho State line to Dryden, and on the west by U. S. Highway 97 from Dryden to the Washington-Oregon State line, including points located on such highways, to points in California located south of Merced.

In its exceptions applicant contends that the joint board erred in not recommending a much broader grant of au-

thority but did not point out in any particular respect wherein it erred. We have reviewed the record herein and our conclusions are set forth above. Applicant does contend, however, that what it did in October or November 1935 is equally as important as what it did in February and March 1935 and on June 1, 1935. This is not entirely correct. We must first determine what operations an applicant was conducting on June 1, 1935, and in respect of this date it is necessary to base our conclusions on the operations conducted during a reasonable period prior thereto. Operations conducted after June 1, 1935, are important, but only to show that applicant has continued the operations which it was conducting on the statutory date. There is no doubt herein of the continuity of applicant's operations. Applicant's further contention that the evidence in this record would sustain a showing of public convenience and necessity for its service as it was being rendered on the date of the hearing, even if true, could not be considered by us on this record which involves "grandfather" rights only. Fisher Common Carrier Application, 17 M.C.C. 565 and 20 M.C.C. 561. In this connection it is noted that applicant filed a BMC 8 application covering this same territory, which application was the subject of a recent hearing.

[fol. 21] No. MC-34383

By application, filed February 5, 1936, under the "grandfather" clauses of sections 206(a) and 209(a) of the act, Pete Lubetich[1], of Seattle, doing business as Pacific Refrigerated Motor Line, seeks a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle, or in the alternative, a permit as a contract carrier by motor vehicle, of general commodities, in interstate or foreign commerce, between points in California, Oregon, and Washington, over irregular routes, and also over certain regular routes, which, in view of our conclusions herein, need not be described.

The operations which applicant seeks authority to continue were commenced on March 15, 1935, and were con-

[1]Substitution of Pete Lubetich, doing business as Pacific Refrigerated Motor Line, as applicant in lieu of John and Pete Lubetich was authorized June 5, 1937, in No. MC-FC 1709.

ducted over a regular route between Los Angeles and Seattle, and also over certain irregular routes. Between June 1935 and January 1938, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers, and was transported in applicant's vehicles only between the terminals of the other carriers. In January 1938, applicant engaged a solicitor of his own, established terminals, and apparently discontinued the operations previously conducted in connection with these other carriers. He now operates eight pieces of equipment, only two of which he owns. Before discussing the question as to whether applicant is entitled to any rights by reason of the operation conducted prior to January 1938, two other questions, pertaining to the opera- [fol. 22] tion, require mention.

The first is whether an interruption in his predecessors' operations, which occurred and lasted during the period from October 22, 1935, either to December 24, 1935, or January 28, 1936—the final date being uncertain—was within the latter's control. While determination of this question is rendered unnecessary by our subsequent conclusion herein, it is pertinent to describe the circumstances surrounding the interruption. Applicant's predecessors purchased a truck in January 1935, and sometime thereafter it developed certain defects, which, while rendering it unsatisfactory, did not prevent its continued use. Being unable to reach an agreement with the vendor looking toward the replacement of the truck, the predecessors attempted to force an understanding by withholding payment of the final installment due on the purchase price, although they had the money with which to meet that obligation. The vendor thereupon repossessed the truck, with the consequent interruption in operations during the period specified. Applicant contends that this interruption was one over which the predecessors had no control, and that they had no intention to cease operation as evidenced by the fact that on October 31, 1935, they made a down payment on a new truck.

The other question presented relates to the bona fides of the operation. Applicant's predecessors were John and his father Pete Lubetich. Operations were conducted on a "family basis" and allegedly as co-partners. The first authority received by them from the State of Oregon, and

which was later canceled, was issued on March 16, 1935, in the name of John Lubetich. Upon cancellation or suspension of this authority, it was necessary that new authority [fol. 23] from the State be sought in the name of Pete, for renewal in the name of John was rendered impossible by reason of the past operating fees owed the State by them in John's name. Pete accordingly applied for authority in his name only, omitting to inform the State that the operation for which the authority was sought was actually the same in which he and John had previously been authorized to engage, or that it was being conducted on a partnership or family basis. Thus was new authority for the operation secured, and at the same time payment of the past fees owing in the name of John avoided.

The joint board to which the application was referred, for hearing and the recommendation of an appropriate order thereon, found that applicant was not entitled to the certificate sought because of the manner, above-described, in which John and Pete Lubetich, applicant's predecessors, dealt with the Oregon authorities. The joint board stated that such operations were not bona fide and recommended that the application be denied. Applicant excepted generally to such finding. Protestants in their reply to the exceptions contend that the finding of the joint board is correct. A determination of this question as to the bona fides of the operation is also rendered unnecessary by our subsequent conclusion herein. Therefore, we will assume, without deciding, that the facts with respect to the issuance of the Oregon permit would not be of such a character, in and of themselves, as to defeat the authority sought.

As hereinbefore stated, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers. Prior to January 1938, applicant operated two trucks. In support of his request for rights under the "grandfather" clause of the act, appli- [fol. 24] cant submitted an exhibit listing shipments transported by him or his predecessors beginning on March 16, 1935, and extending to the date of the hearing. Hendricks Refrigerated Truck Lines, Inc. (hereinafter called Hendricks), the operations of which are described above under No. MC-68618, contends that applicant and his predecessors were merely so-called owner-drivers for it and that applicant did not commence an operation in his own name until January 1938.

A witness for Hendricks testified that he was familiar with applicant's operations for Hendricks; that he had present at the hearing the manifests showing the numbers of the trucks, the original bill of lading showing consignor and consignee, and the delivery receipt for the merchandise tonnage; that applicant made no trips other than those routed out of its (Hendricks) office; and that the manifests cover the complete loads transported on applicant's equipment.

During the period from April 1937 until January 1938, at least, every shipment listed in applicant's exhibit purporting to prove operations was transported by applicant for Hendricks. In such instances the bills of lading were issued by Hendricks, and Hendricks employed applicant to transport the goods. On southbound loads applicant was credited with the total revenue less 10 percent; and on northbound fruit and produce transported he was credited with the total revenue, while on certain traffic called "express" (explained in our discussion under No. MC-68618) he was paid a flat rate of 80 cents per hundred pounds. The tariff rates applied were those of Hendricks. Applicant or his predecessors also sent Hendricks telegrams requesting loading instructions or reporting loadings. With respect to settlement of claims with shippers, [fol. 25] the general practice was for Hendricks to pay the claim, although the amount was later deducted from that paid applicant.

From August 5, 1937, to September 18, 1937, both of the Lubetichs were either fishing or buying fish for a certain fish company. During this period operations were conducted with one truck. On at least one trip, applicant's driver was supplied with Hendricks' requisitions for the purchase of gasoline and Hendricks gave applicant's driver checks in small amounts to pay his expenses from Seattle to Los Angeles. These advances and cost of gasoline were later deducted from the settlement made by Hendricks to applicant.

Although applicant contends that he made some trips in which he did not have freight loaded by Hendricks, he submitted no documentary evidence to support this contention, and, in fact, the evidence shows that at least during the period from April 1937 until January 1938, the only freight transported in applicant's equipment was for Hendricks, a common carrier by motor vehicle. During the period in

question applicant and his predecessors apparently held permits from the States of California, Washington, and Oregon, and, at least, paid a monthly fee to the latter State based upon the total number of miles operated therein. The 1937 license issued by the Board of Equalization of California reads: "Pete Lubetich * * * C/o J. J. Hendricks, Los Angeles".

The facts in this case are similar to those discussed in B-Line Motor Freight Common Carrier Application, 20 M.C.C. 538, wherein we stated that such service was not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers, and concluded:

[fol. 26] During the period of such operations he in effect abandoned for the time his own operations as a common carrier and assumed the position of an owner-operator. Such operations do not entitle him to the certificate sought. See Dixie Ohio Exp. Co. Common Carrier Application, 17 M.C.C.735.

As this same situation is present in the instant case, like findings should be made.

The record contains certain contradictory evidence having a bearing upon whether Hendricks was in fact operating as a broker during the period in question and also as to whether the name of applicant or his predecessor was carried on their respective pieces of equipment. However, these questions are not controlling in view of the facts discussed above and need not be given further consideration herein.

No. MC-8522

By application [5], No. MC-8522, filed February 7, 1936, A. Fornaciari, of Seattle, sought a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle, or in the alternative, a permit as a contract carrier by motor vehicle, of general commodities, with certain exceptions, in interstate or foreign commerce, between points in California,

[5] Under the "grandfather" clauses of sections 206(a) and 209(a) of the act.

Oregon, and Washington, over irregular routes. By application [5], No. MC-33581, filed February 7, 1936, I. A. Taylor, of Seattle, doing business as American Motor Freight Co., also sought a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle, or in the alternative, a permit as a contract carrier by motor vehicle, of general commodities, with certain exceptions, in interstate or foreign commerce, between points in California, Oregon, and Washington, over irregular routes. Division 5, on September 17, 1936, in No. [fol. 27] MC-FC 177, approved the substitution of Williams Brothers, Inc., of Tacoma, Wash., as applicant in lieu of I. A. Taylor; and also, on June 7, 1937, in No. MC-FC 1831, in lieu of A. Fornaciari. The application originally filed by Taylor has since been consolidated with that of Fornaciari, and the two now bear the docket number of the latter, No. MC-8522. The term "applicant", as hereinafter used, will refer to the present applicant, Williams Brothers, Inc.

Taylor's operations. These operations, which were conducted under several different trade names, were commenced in 1932, and involved the solicitation from the general public of traffic on behalf of various motor carriers, including Fornaciari and Lubetich. Taylor received from these carriers compensation in the form of commissions on the traffic thus secured. The only actual motor transportation Taylor himself performed with equipment of which he was the owner, aside from two or three trips between Seattle and Los Angeles in July and August 1935, was conducted between Denver, Colo., and Seattle [6].

There is nothing in the record of this proceeding to indicate that the operations of Taylor as of June 1, 1935, were other than, at most, those of a broker as defined in section 211 of the act. There is no contention on his part that he exercised any control over the motor carriers for whom he solicited; Fornaciari, at least, hauled freight that Taylor did not solicit and on which freight Fornaciari paid no commission to Taylor. The drivers of the vehicles picked

[6] I. A. Taylor's operations between Denver and Seattle are covered by application No. MC-6746, which application was heard recently and will be the subject of a separate report.

up from the shippers the freight solicited by Taylor; they [fol. 28] collected the money due for the freight hauled; and Taylor went to the homes of the carriers at certain intervals to collect the commissions due him from them for solicitation. In short, Taylor's operations may be summed up in his answer to the following question asked him on direct examination by counsel for applicant:

Question: Your operation, insofar as these other trucks [those of Lubetich and Fornaciari] were concerned, was one solely of soliciting freight for them?

Answer: Yes, that is right.

Applicant purchased whatever rights Taylor had to a certificate or permit issuable under No. MC-33581 and in May 1936 began operations primarily between Seattle and Los Angeles. As stated, division 5 approved the transfer on September 17, 1936, but, of course, such transfer was predicated on the theory that Taylor was entitled to rights as a common or contract carrier by motor vehicle as they are the only rights transferable. As Taylor was not operating as either a common carrier or as a contract carrier by motor vehicle between the points covered by this application on June 1, 1935, applicant acquired no rights by its purchase from Taylor. Therefore, if applicant acquired any rights under the act, it would be solely by virtue of the operations of Fornaciari whose rights it acquired in June 1937 and whose operations will be discussed next.

Fornaciari's operations. These operations, commenced in January 1935, were conducted between Seattle and Los Angeles, and involved traffic which was secured partly through Taylor's solicitation. During the period from April 1936 to January 1937 Fornaciari transported from terminal to terminal freight turned over to him by the Tri-State Fast Freight, and at that time the name "Tri-State" was carried on the front of his truck. In January 1937 Fornaciari entered into a lease arrangement with the Tri-[fol. 29] State Motor Lines, Inc.[7], but he denies that the lease was ever valid. Irrespective of its validity, however, not more than one trip was actually made under it. From

[7] The operations of Tri-State Motor Lines, Inc., No. MC-18719, will be the subject of a separate report and will be included in No. MC-18718, Alvin T. Knapp Broker Application.

February to June 1937 Fornaciari also handled traffic originated by Hendricks, whose application has hereinbefore been discussed.

As the condition precedent to the issuance of a certificate or a permit under the "grandfather" clauses of the act is bona fide operation on June 1, 1935, or July 1, 1935, as the case may be, and continuous operation as such since that time, it is, therefore, necessary to determine only whether Fornaciari's operations from February to June 1937 were such as would entitle him to the rights herein sought.

All the traffic handled by Fornaciari during this period was turned over to him and was solicited, by Hendricks. Hendricks also issued the bills covering the transportation, collected the charges therefor, based upon its own tariffs, and paid Fornaciari a certain percentage of the revenue realized on southbound loads and a flat rate on express northbound. Shippers' claims were settled by Hendricks, although the amount was later deducted from that paid Fornaciari. Fornaciari, however, did carry insurance on his truck, maintain a cargo policy, and file reports with the states of California, Oregon, and Washington on the amount of freight hauled by him each month. He also paid those States operating fees based on his portion of the total revenue and purchased from them licenses on his equipment.

From the above facts in respect of Fornaciari's operation, it is evident that our conclusions under No. MC-34383 are also applicable here. During the period of operations for Hendricks, Fornaciari in effect abandoned for the time his own operations as a common carrier and assumed the [fol. 30] position of an owner-operator. B-Line Motor Freight Common Carrier Application, supra. As such operations do not entitle him to the authority sought, it is evident that applicant, as successor in interest to Fornaciari, likewise is not entitled to any rights. Accordingly it is unnecessary to discuss the operations performed by applicant or those performed by Fornaciari prior to February 1937.

Findings

We find in No. MC-68618 that applicant's predecessors in interest were on June 1, 1935, and that applicant or its predecessors continuously since have been, in bona fide

operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of the commodities named, from and to the points, and over the routes described in the appendix attached hereto; that applicant is entitled to a certificate of public convenience and necessity authorizing continuance of such operation; and that in all other respects the application should be denied.

We further find in No. MC-34383 that applicant has not established that on June 1, 1935, or July 1, 1935, as the case may be, his predecessors were and that he or his predecessors since have been in bona fide operation as a common or contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points, and in the territory included in the application; and that the application should be denied.

We further find in No. MC-8522 that applicant has not established that on June 1, 1935, or July 1, 1935, as the case may be, its predecessors were and that it or its pre-[fol. 31] decessors since have been in bona fide operation as a common or contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points, and in the territory included in the application; and that the application should be denied.

Upon compliance by applicant in No. MC-68618 with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the applications except to the extent a certificate is granted herein in No. MC-68618.

LEE, Commissioner, dissenting in part:

In general I approve the disposition made of the Hendricks application, and I approve the denial of any rights based on Taylor's alleged operations.

As to the denial of claims based on the operations of Lubetich and Fornaciari, I dissent. There is no question but that these men were engaged in transportation by motor vehicle prior to and since the "grandfather" date. Furnishing transportation was their business. They were real truckers; they sat behind a wheel and not behind a desk. Here they are held to have been neither common nor contract carriers, but are dubbed "owner-operators" because for relatively short periods, long after the effective date of

the act, they hauled freight "loaded" by Hendricks and Tri-State. The only authority relied upon by the majority is the B-Line case, a two-page decision in which the question was not thoroughly explored, and to which I dissented.

Even during those periods when they are said to have acted as "owner-operators", Lubetich and Fornaciari continually maintained their respective State operating author- [fol. 32] ities and themselves bore the cost of insurance, operating expenses, etc. Moreover, Lubetich testifies that during this period he did not confine his operations to traffic secured by Hendricks, but hauled other freight as well. No one contradicts this testimony but the majority's report rejects it wholly because he submitted no documentary evidence in corroboration thereof.

Because Hendricks is held to be a common carrier, Lubetich and Fornaciari, who hauled freight for Hendricks, are now denied any rights whatever. I believe that Congress intended that all "grandfather" carriers for hire should be given operating authority, whether they served the general public or confined their operations to hauling freight furnished by a selected shipper or by another carrier. I think Lubetich and Fornaciari had rights as common or contract carriers by motor vehicle, and that their respective successors are entitled to corresponding operating authority.

[fol. 33] Appendix

1. General commodities, except those of unusual value, explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, and commodities requiring special equipment other than refrigeration, from Seattle, Wash., to Los Angeles, Calif., as follows:

From Seattle over U. S. Highway 99 to Portland, Oreg.; from Portland over U. S. Highway 99E to junction with and thence over U. S. Highway 99 to Red Bluff, Calif.; thence over U. S. Highway 99E to Sacramento, Calif.; and thence over U. S. Highway 99 to Los Angeles.

Service from Seattle to all intermediate points in California and the off-route points of San Pedro, Long Beach, Hollywood, Terminal Island, Santa Monica, and Wilmington, Calif.

2. General commodities, with the above-described exceptions, from Los Angeles to Medford and Portland, Oreg., and Seattle, as follows:

From Los Angeles to Seattle over the above-described route.

3. Fruits and vegetables, over irregular routes:

1. From points in California situate south of a line drawn east and west through Merced to points in Washington, movements to points east of the Cascade Mountains to be in lots of not less than 10,000 lbs.

2. From points in Washington on and south of U. S. Highway 10 from the Washington-Idaho State line to Dryden, and on and east of U. S. Highway 97 from Dryden to the Washington-Oregon State line—to points in California situate south of a line drawn east and west through Merced.

[fol. 34] Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 2nd day of July, A. D. 1940, No. MC-68618, Los Angeles-Seattle Motor Express, Inc., common carrier application, No. MC-34383, Pete Lubetich common carrier application, No. MC-8522, Williams Brothers, Inc., common carrier application.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the application in No. MC-68618, except to the extent granted in said report, be and it is hereby, denied, effective August 20, 1940.

It is further ordered, That the applications in Nos. MC-34383 and MC-8522 be, and they are hereby, denied, effective August 20, 1940.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 35] EXHIBIT B TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 31st day of December, A. D. 1940.

No. MC-68618

Los Angeles-Seattle Motor Express, Inc., Common Carrier Application

No. MC-34383

Pete Lubetich Common Carrier Application

No. MC-8522

Williams Brothers, Inc., Common Carrier Application Seattle, Washington

Upon further consideration of the record; and good cause appearing:

It is ordered, That the order of this Commission of July 2, 1940, which by its terms denied, in whole or in part, the applications herein, effective August 20, 1940, and which by subsequent orders was modified, insofar as it denied the application in No. MC-34383, to become effective January 4, 1941, be, and it is hereby, further modified to the extent that the denial order, insofar as it denies the application in No. MC-34383, is to become effective January 10, 1941.

It is further ordered, That the effectiveness of said order, insofar as it denied the application in No. MC-68618, which by order entered October 11, 1940, as thereafter modified, was stayed to become effective January 4, 1941, be, and it is hereby, further stayed to become effective January 10, 1941.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 36] EXHIBIT C TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 16th day of October, A. D. 1937.

No. MC 34383

Application of Pete Lubetich, Doing Business as Pacific Refrigerated Motor Line, Seattle, Washington

After due investigation:

It appearing, That the applicant in accordance with the requirements of Section 206 of the Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle as set forth below, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance by the said applicant, prior to the effective date of this order, with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, and governing the construction and filing of common carrier rate publications, a certificate of public convenience and necessity shall be issued to the said applicant on the effective date of this order, or at such later date as the Commission may designate, authorizing him to engage in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities indicated, over the regular route, between fixed termini, and to and from intermediate and off-route points, as specified below:

Commodities generally, except those of unusual value, and except high explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Seattle, Wash., and Los Angeles, Calif.:

From Seattle over U. S. Highway 99 to Los Angeles, and return over the same route.

Intermediate points: Chehalis, Wash., Portland, Oreg., and Fresno, Calif.

Off-route points: San Francisco, Calif., for the above-specified commodities; and points and places in Fresno, Tulare, Los Angeles, Orange, Riverside, and San Bernardino Counties, Calif., and Pierce, Yakima, and King Counties, Wash., for fruit and vegetables only.

It is further ordered, That in the event said applicant has not complied with said requirements, rules, and regulations on the effective date of this order, or at such later date as the Commission may designate, consideration will be given to the denial of such certificate and the dismissal of the application therefor.

And it is further ordered, That this order shall become effective the 15th day of November, A. D. 1937, unless on the Commission's own motion or for good cause shown by applicant or any other party in interest it is otherwise ordered.

By the Commission, Division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 37] EXHIBIT D TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 13th day of November, A.D. 1937.

No. MC 34383

Application of Pete Lubetich, Doing Business as Pacific Refrigerated Motor Line, Seattle, Washington

It appearing, That an order having been issued by the Commission as provided by Section 206 of the Motor Carrier Act, 1935, to become effective on the 15th day of November, A. D. 1937, unless on the Commission's own motion or for good cause shown by applicant or any other party in interest it is otherwise ordered.

It further appearing, That a petition having been filed by the applicant showing good cause that the said order should not become effective on the said date,

It is ordered, That the taking effect of the order in the above-entitled matter be, and it is hereby, stayed pending the further action of the Commission.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fols. 38-39] EXHIBIT E TO COMPLAINT

Western Union

MA 440 34 NT Collect 1 Extra-Washington DC 6

Jan 6 PM 8 46

Albert E. Stephan, Northern Life Tower Bldg., Seattle, Wash.

Commission has denied further postponement in EMSEE 34383 and denial order is effective January 10. Any request for further postponement pending court proceeding will be considered only if made by federal judge.

W. Y. Blanning, Director, Bureau of Motor Carriers.

EMSEE 34383 10.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

[File endorsement omitted]

No. 314—Civil

PETE LUBETICH, an individual doing business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed February 11, 1941

Comes now the Interstate Commerce Commission (hereinafter called the Commission) and, pursuant to leave of Court under Sections 212 and 213 of the Judicial Code

(U. S. C. Title 28, Sec. 45a), intervenes as a party defendant in the above-entitled cause, and for its answer to the complaint herein says:

I

Answering paragraphs I and II of the complaint, the Commission admits that the plaintiff is an individual doing business as Pacific Refrigerated Motor Line, with his principal place of business in Seattle, Wash.; that in so far as [fol. 41] plaintiff's business is that of a common carrier by motor vehicle, he is subject to regulation by the Interstate Commerce Commission; that this suit has been brought by the plaintiff under an act of Congress approved October 22, 1913, known as the "Urgent Deficiency Appropriations Act", 38 Stat. L. 219, to enjoin and set aside a certain order of the Commission; the Commission further admits and alleges that on July 2, 1940, the Commission, in a proceeding before it designated MC 34383, Pete Lubetich Common Carrier Application, made its report and order denying the application of said Pete Lubetich, plaintiff herein; that a true copy of said report and order of July 2, 1940, is appended to the complaint herein as Exhibit A; that said order is officially reported (along with certain other reports of the Commission) under the title of Los Angeles-Seattle Motor Inc. Common Carrier Application, 24 M. C. C. 141, the Commission's report relative to the Lubetich proceeding aforesaid beginning on page 147; that by successive orders the Commission has postponed the effective date of said order to March 11, 1941; and the Commission denies each of and all the other allegations of said paragraphs I and II.

II

Answering paragraph III of the complaint, the Commission admits and alleges that on or about February 5, 1936, John and Pete Lubetich, a co-partnership, filed with the Commission their application under the so-called "grandfather" exception contained in Section 206 of the Motor Carrier Act, 1935, wherein they sought a "grandfather" certificate of public convenience and necessity which would [fol. 42] authorize transportation by them as common carriers of general commodities, between Seattle, Wash., and Los Angeles, Calif., over certain designated highways and

to certain off-route points in said application stated; that said application was filed on the Commission's form BMC 1, prescribed by it for application for certificates under the "grandfather" clause of Section 206 of said Motor Carrier Act, wherein such certificates were claimed by applicants upon the ground of bona fide operations on June 1, 1935, for common carriers, and continuously thereafter; that protests were filed with the Commission by and on behalf of divers competing carriers opposing the issuance of the certificate prayed in said application; that on or about June 5, 1937, the Commission approved of a sale by John and Pete Lubetich to Pete Lubetich, doing business as Pacific Refrigerated Motor Line, and that thereafter said proceeding was designated by the Commission as the application of said purchaser; that in accordance with law said application was by the Commission referred to Joint Board No. 5 for hearing; that said application came on for hearing before said Joint Board sitting at Seattle, Wash., on September 29 and 30, 1938; that at said hearing the plaintiff, the protestants and numerous other interested parties appeared and a large amount of testimony and other evidence was offered on behalf of the parties, including evidence on behalf of the plaintiff; that said evidence was all addressed to the issue of bona fide operation by the plaintiff and his predecessor on June 1, 1935, and thereafter; that written briefs were filed with the said Joint Board on behalf of the plaintiff and also on behalf of divers protestants, and the Joint Board, on or about August 25, 1939, issued its recom-[fol. 43] mended report and order; that exceptions were filed with the Commission by and on behalf of the plaintiff to said recommended report and order, together with briefs on behalf of the plaintiff supporting his said exceptions; that the protestants aforesaid filed reply briefs opposing said exceptions.

The Commission further admits and alleges that in the course of said proceedings aforesaid the plaintiff and all other parties to said proceeding were, and that each of them was, afforded the full hearing provided for in and by the Interstate Commerce Act; that after said matters had been fully argued and submitted to the Commission as aforesaid for determination, the Commission, by its Division 5, determined said matters and entered and duly served upon the plaintiff and all other interested parties its said report and order of July 2, 1940, which said report and

order include the Commission's findings of fact, decision, conclusions, orders and requirements in the premises, and that upon the evidence taken before the Joint Board as aforesaid, as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order are based.

The Commission further alleges and shows that the findings and conclusions set forth in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in the proceeding; that in making its report and order the Commission considered and weighed carefully, in the light of its own knowledge and experience each fact, circumstance and condition developed in said hearing on behalf of the parties to said proceeding, [fol. 44] including matters covered by the allegations of the complaint herein; that said order of July 2, 1940, was not made either arbitrarily or contrary to the relevant evidence, or without evidence to support it; and that the Commission, in making said order, did not exceed its authority duly conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in said paragraph.

III

Answering paragraphs IV and V of the complaint, the Commission admits and alleges that on or about September 15, 1939, plaintiff filed with the Commission another application for a certificate of convenience and necessity based upon the provisions of Section 207a of the Motor Carrier Act, upon form BMC 8, which form had been designated by the Commission to be used in applications for certificates of convenience and necessity based upon factual public convenience and necessity as described in Section 207a of the Act; that the Commission designated said BMC 8 application as MC-34383 (Sub. No. 1) and assigned the matter for hearing before a Joint Board at Seattle, Wash., on January 30, 1941, and at Los Angeles, Calif., March 19 and 20, 1940; that upon said dates hearings were duly held and the evidence received at said hearings has been duly submitted to said Joint Board for its consideration and the formulation of a recommended report to be submitted to the Commission; that said proceeding is now in process of determination, although no report and order have as yet been made

by the Commission therein, and except as hereinabove admitted, the Commission denies each of and all the allegations in said paragraphs IV and V contained.

[fol. 45] IV

Answering the allegations of paragraph VI of the complaint, the Commission admits the allegations therein contained, except that the Commission denies that said paragraph contains a full, true or correct statement of the contents of the successive petitions presented by the plaintiff to the Commission seeking extension of the effective date of the Commission's report and order of July 2, 1940.

V

Answering the allegations of paragraphs VII, VIII and IX of the complaint, the Commission admits that its said order of July 2, 1940, denies plaintiff's application for a "grandfather" certificate, and the Commission further alleges and shows that Section 206 of the Motor Carrier Act authorized the continuance of the operations of an applicant for a "grandfather" certificate only while said application is pending, and admits that by operation of law the further continuance by plaintiff of the operations carried on by him will become illegal when said application is no longer pending, that is to say, when said report and order of July 2, 1940, have become effective, the pendency of plaintiff's BMC 8 application notwithstanding; the Commission further alleges and shows that any loss or damage to which plaintiff might be subjected upon the Commission's said order becoming final and said proceeding no longer pending would result from operation of law and not from any order made or entered by the Commission; and the Commission denies each of and all the other allegations in said paragraphs contained.

[fol. 46] VI

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, in so far as they conflict either with the allegations herein or with the statements contained in the Commission's said report of July 2, 1940.

Wherefore, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Attorney, 3328 Interstate Commerce Bldg., Washington, D. C. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 47] *Duly sworn to by John L. Rogers, jurat omitted in printing.*

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed Feb. 18, 1941

The defendant, United States of America:

1. Admits the allegations of paragraph I to the first semicolon; denies the remaining allegations.

2. Admits the allegations of paragraphs II, III, IV, V and VI.

3. Denies the allegations of paragraph VIII.

4. Answering paragraphs VII and VIII, admits that when the Interstate Commerce Commission's order of July 2, 1940 becomes effective, plaintiff's operations will be in violation of the Motor Carrier Act of 1935 unless he has at that time obtained a certificate of public convenience and necessity from the Commission; is without knowledge and information sufficient to form a belief as to the truth of the allegations relating to injury and damage but alleges that any such injury or damage will result from operation [fol. 49] of law and not from any unlawful act of the Commission.

Frank Coleman, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

Thurman Arnold, Assistant Attorney General; J. Charles Dennis, Esq., United States Attorney.

I certify that a true copy of the foregoing Answer of the United States of America was this day mailed to the following persons:

Albert E. Stephan, Esq., Northern Life Tower Building, Seattle, Washington, Counsel for Plaintiff. Nelson Thomas, Esq., Washington, D. C., Counsel for Interstate Commerce Commission.

Frank Coleman, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

February 8, 1941.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FIRST SUPPLEMENTAL COMPLAINT—Filed April 4, 1941

Comes now the plaintiff above named and respectfully shows:

I

That this suit was brought to set aside and enjoin enforcement of an order of the Interstate Commerce Commission dated July 2, 1940, entered in cause entitled MC 34383, Pete Lubetich Common Carrier Application, as amended and supplemented by a further order of the Commission entered in the same cause on December 31, 1940, copies of said orders being attached as Exhibit "A" and Exhibit "B" respectively to the original petition filed in this cause on January 8, 1941.

II

That on February 4, 1941, said Interstate Commerce Commission, without taking any further evidence in its said cause MC 34383, entered therein a further order which, omitting formal parts, was as follows:

"*It is ordered*, That the order of this Commission of July 2, 1940, which by its terms as thereafter modified denied the [fol. 51] application. In No. MC-68618 effective January

10, 1941, be, and it is hereby, stayed and suspended to the extent that the denial of the application in No. MC-68618 shall be effective March 11, 1941."

III

That on February 18, 1941, said Interstate Commerce Commission without taking any further evidence in its said cause, MC 34383, entered a further order, which, omitting formal parts, was as follows:

"*It is ordered*, That the order of this Commission of July 2, 1940, which by its terms denied, in whole or in part, the applications herein, effective August 20, 1940, and which by subsequent orders was modified to the extent that the application in No. MC 34383 is to become effective March 11, 1941, be, and it is hereby, modified to the extent that the denial order insofar as it denies the application in No. MC 34383 shall become effective May 12, 1941."

IV

That none of said orders of the Interstate Commerce Commission entered subsequent to the entry of said original order of July 2, 1940, modified said original order in any respect except by postponing the date on which plaintiff is required by said original order to cease the operations described in paragraph I of the original complaint herein; and that the matters complained of by complainant in his original petition herein are not changed or affected in any respect by any of said orders entered by said Interstate Commerce Commission subsequent to July 2, 1940.

V

That subsequent to the filing of the original complaint, to-wit, on February 18, 1941, there was served on plaintiff the recommended report and order proposed by Joint Board [fol. 52] No. 5 in the Commission's Docket No. MC 34383 (Sub. No. 1) to which reference is made in paragraphs V and VI of the original complaint; that by a letter dated March 6, 1941, the Commission has extended until April 15, 1941, the date for filing exceptions to said proposed report and order; that exceptions are now being prepared by applicant and will be forwarded to the Commission by April 15, 1941, together with a request for oral argument in said

case; that said matter will not be finally decided by the Interstate Commerce Commission until an unknown date subsequent to April 15, 1941.

VI

That further particularizing the allegation of unlawful action by the Commission, as set forth in paragraph VIII (1) of said original complaint, complainant specifically alleges that the Commission's decision in its Docket MC 34383, Pete Lubetich Common Carrier Application was contrary to law in that it denied to complainant rights to continue operations as a common carrier by motor vehicle upon the erroneous theory that because it found that he was for a period of time a so-called "owner-operator" that therefore he had lost rights to operate as a common carrier by motor vehicle.

Wherefore, Plaintiff reiterates the prayer of his original complaint herein and prays that same be extended so as to apply to each and all of the orders of the Interstate Commerce Commission mentioned in said First Supplemental Complaint, as well as to the further matters set forth in paragraphs V and VI above.

Albert E. Stephan, Preston, Thorgrimson, Turner, Horowitz and Stephan, Northern Life Tower, Seattle, Attorneys for Plaintiff.

[fols. 53-392] *Duly sworn to by Albert E. Stephan, jurat omitted in printing.*

[fol. 393] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed June 10, 1941

Before Haney, Circuit Judge, and Bowen and Black, District Judges

BLACK, District Judge:

In plaintiff's action, as set forth in his complaint and supplemental complaint, plaintiff sought to set aside an order of the Interstate Commerce Commission denying

him a "grandfather" certificate authorizing common carrier operation between points in California, Oregon and Washington upon the contention that on and prior to June, 1935 and continuously thereafter he has been engaged in a bona fide common carrier operation, and further sought in the event such "grandfather" application should be denied to have this Court require the effective date of such denial order to be deferred until the Commission shall dispose of plaintiff's BMC 8 application for a certificate of public use and necessity, which last application was filed about three years after the "grandfather" application was made. [fol. 394] The Commission's order denying the "grandfather" application was issued July 2, 1940 in a proceeding entitled "Pete Lubetich Common Carrier Application 24 Motor Carrier Cases 141 (the portion of the printed report referring to the Lubetich application beginning on page 147)". The first effective date of such denial order was August 10, 1940 but such effective date, at the request of plaintiff, was continued from time to time to January 10, 1941. The Commission shortly before January 10, 1941 advised that it would be willing, at the request of the Court, to further extend the effective date of the order, which upon such Court request it has extended until June 15, 1941, so as to permit the hearing before this three-judge Court prior to the final effective date.

Such consideration by the Commission is substantial evidence that it has not been arbitrary towards plaintiff, as plaintiff contends.

The evidence presented to the Commission consisted of both oral testimony and a large quantity of exhibits. Plaintiff has introduced before us a transcript of the oral testimony but such transcript failed to include the exhibits. Such exhibits are an important part of the evidence.

The plaintiff acknowledges that the failure to produce all of the evidence before the Court has heretofore been held a bar to the Court's passing upon any contention that the findings of the Commission are contrary to the evidence.

Unquestionably without bringing before the Court all the evidence considered by the Commission the plaintiff cannot question the facts found by the Commission.

[fol. 395] Tagg Bros. v. United States, 280 U. S. 420, 443-444;

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 285-286.

In connection, therefore, with plaintiff's attempt to set aside the order denying plaintiff the "grandfather" certificate as a common carrier, the Court is only entitled to consider whether or not the ruling of the Commission was supported by the findings as made by it.

The plaintiff chiefly relies upon this phase of the case upon the decision in N. E. Rosenblum Truck Lines v. United States, (D. C. Mo.) 36 F. Supp. 467, in which a similar Court to this one held that that plaintiff was entitled to a "grandfather" permit as a contract carrier. Plaintiff's complaint and supplemental complaint are based entirely upon the contention that the Commission was in error in denying him rights as a "common carrier". Plaintiff in such pleadings only asked that the Commission's order should be suspended or set aside "insofar as same requires plaintiff to cease his operations as a common carrier * * *." Such in any event distinguishes the Rosenblum case, supra.

Included in the findings of the Commission 24 M. C. C., 141 at pages 147-150, we find the following:

"The operations which applicant seeks authority to continue were commenced on March 15, 1935, and were conducted over a regular route between Los Angeles and Seattle, and also over certain irregular routes. Between June 1935 and January 1938, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers, and was transported in applicant's vehicles only between the terminals of the other [fol. 396] carriers. In January 1938 applicant engaged a solicitor of his own, established terminals, and apparently discontinued the operations previously conducted in connection with these other carriers. He now operates eight pieces of equipment, of which he owns only two. * * *

"As hereinbefore stated, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers. Prior to January 1938, applicant operated two trucks. * * *

"During the period from April 1937 until January 1938, at least, every shipment listed in applicant's exhibit purporting to prove operations was transported by applicant for Hendricks." (Referring to Hendricks Refrigerated Truck Lines, Inc., the operations of which are described in said same report under No. MC-68618.) "In such instances the bills of lading were issued by Hendricks, and Hendricks employed applicant to transport the goods. * * * The

tariff rates applied were those of Hendricks. * * * in fact, the evidence shows that at least during the period from April 1937 until January 1938 the only freight transported in applicant's equipment was for Hendricks, a common carrier by motor vehicle."

Although the plaintiff appears to have been a common carrier from January, 1938 to the time of the hearing, such findings of the Commission certainly support the conclusion that the plaintiff was not at all times from before the critical date of June 1, 1935 to January, 1938 a common carrier. Under the authority of United States v. Maher, 307 U. S., 148, 155, it was necessary that plaintiff should be such from June 1, 1935 to the date "when the Commission passed upon the application" for a certificate under the "grandfather" clause.

Clearly, on the record before this Court, we have no authority to disturb the denial by the Commission of certificate to plaintiff under the "grandfather" clause.

[fol. 397] The alternative contention of plaintiff is that the Court should compel deferment of the effective date of such order of denial until the BMC 8 application is passed upon.

Plaintiff's two applications constitute two separate proceedings, one of which has been finally disposed of—the other is awaiting future decision. We cannot accept plaintiff's suggestion that a BMC 8 proceeding, which plaintiff delayed instituting until three years after his application under the "grandfather" clause was made and which, in fact, was not instituted until less than ten months before the decision denying his earlier application, can be welded to and made a part of the "grandfather" proceeding so as to prevent final action upon the "grandfather" proceeding until the BMC 8 proceeding is ultimately disposed of. Under the Interstate Commerce Act the Commission is granted power to determine when its orders shall become effective. Since it had the authority to deny the "grandfather" application it could say when that order should be effective. The Supreme Court in United States, et al. v. Baltimore & Ohio R. Co., et al., 284 U. S. 195, said:

" 'Orders (referring to those of the Interstate Commerce Commission) * * * shall take effect * * * according as shall be prescribed in the order.' The courts may not usurp the function of the Commission and say one

of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date, if any, is the one actually appointed, not one which might have been."

Also see Philadelphia-Detroit Lines, Inc. v. United States, 31 F. Supp. 188. This last case upon appeal was affirmed [fol. 398] per curiam by the Supreme Court, 308 U. S. 528.

As in that case, we hold that the Commission's action in this instant case was "a valid exercise by the Commission of its discretionary powers of which no abuse appears".

To sustain plaintiff's contention upon the second phase of the case before us would give precedent for untoward results that would completely dwarf the injury plaintiff complains of.

The logic of the situation refutes plaintiff's contention. It was plainly the Congressional intent to permit operation during the pendency only of a "grandfather" application. An applicant for a BMC 8 certificate is accorded no such privilege. If it is advisable that BMC 8 applicants ought also to have the privilege of operation while awaiting decision from the Commission the request for such should be made to Congress and not to the Court.

Plaintiff's action is dismissed.

Lloyd L. Black, District Judge.

We concur. Bert Emory Haney, Circuit Judge. John C. Bowen, District Judge.

[fol. 399] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 8, 1941

In the above-entitled cause the Court makes the following findings of fact:

1. The plaintiff, Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, has brought this suit under the Act of Congress approved August 9, 1935, and amendments thereto, and the Urgent Deficiencies Act of October 22, 1913, to set aside an order of the Interstate

Commerce Commission as hereinafter described, which denies an application made by said plaintiff for a certificate or a permit under the "grandfather" provision of Section 206(a) and 209(a) of the Motor Carrier Act authorizing certain operations by him as a common or contract carrier by motor vehicle. The complaint further prays that in the event the Court should find that the Commission's order [fol. 400] denying said "grandfather" application should not be set aside and annulled, the Court should require the Commission to postpone the effective date of said denial order until the Commission should have disposed of another application made by plaintiff seeking a certificate for substantially the same operations under Section 207 of the Motor Carrier Act upon proof of factual convenience and necessity.

2. The plaintiff, on or about February 5, 1936, filed his "grandfather" application above referred to with the Commission wherein he sought a certificate of public convenience and necessity or in the alternative a permit authorizing operations as a common carrier or in the alternative as a contract carrier by motor vehicle of general commodities in interstate or foreign commerce between points in California, Oregon and Washington over irregular routes and also over certain regular routes.

3. Certain competing carriers operating in and through the territory involved intervened in the Commission proceeding and filed their protests opposing plaintiff's application.

4. The said proceeding was designated by the Commission as No. MC 34383, Pete Lubetich Common Carrier Application, and was set down for hearing and the receiving of evidence before a joint board as required by statute and came before the Commission upon exceptions from a recommended report of said joint board.

5. At said hearing before the joint board the plaintiff introduced a large amount of evidence and argued fully the facts and the law considered pertinent to his application.

6. The Commission on July 2, 1940, made its report and order in said proceeding, its report being printed in 24 M.C.C. 141, the portion referring to the Lubetich applica- [fol. 401] tion beginning on page 147. In said report the

Commission found that the evidence failed to show that Lubetich or his predecessor on June 1, 1935, and thereafter, had been in bona fide operation as a common or contract carrier by motor vehicle in interstate or foreign commerce of general commodities between the points and in the territory included in the application, and the Commission thereupon entered an order denying the plaintiff's said application.

7. The record in this Court does not contain all the evidence received and considered by the Commission and the Court has, therefore, considered plaintiff's suit upon the facts stated in the Commission's report.

8. On September 15, 1939, plaintiff filed with the Commission another application for a certificate which would authorize substantially the same operations as those described in his "grandfather" application. This application was filed under the provisions of Section 207 of the Motor Carrier Act and was based upon allegation and proof of factual convenience and necessity. A hearing has been had upon said application, evidence taken, and said application is now under consideration by the Commission and has not as yet been acted upon.

9. The plaintiff duly applied to the Commission for a reconsideration of its report and order and the Commission has denied the same.

Conclusions of Law

The Court makes the following conclusions of law:

1. The Commission's report and order of July 2, 1940, and its denial of plaintiff's application for a "grandfather" certificate or permit as prayed in its application to the [fol. 402] Commission and as stated in plaintiff's complaint herein were justified and constitute a valid exercise of the Commission's powers under the Motor Carrier Act of 1935.

2. The findings set forth in the Commission's report, considered as a whole, are sufficient to sustain and justify the order made by the Commission denying plaintiff's application for a "grandfather" certificate, or permit.

3. The action of the Commission upon plaintiff's application was a valid exercise of the Commission's legal powers and in the absence of the introduction by plaintiff in

evidence before this Court of all the evidence received and considered by the Commission, the statements and findings of fact set out in the Commission's report must, for the purposes of this suit, be considered as supported by substantial evidence.

4. The construction of law applied by the Commission in its report and order was and is correct.

5. The pendency of the plaintiff's application for a certificate under Section 207 of the Motor Carrier Act does not afford any ground for this Court suspending the force and effect of the Commission's order of July 2, 1940, upon the plaintiff's "grandfather" application until the determination of his other application.

6. The relief which plaintiff prays should be denied and its suit dismissed for want of equity.

Bert Emory Haney, United States Circuit Judge.
John C. Bowen, United States District Judge.
Lloyd L. Black, United States District Judge.

July 8, 1941.

[fols. 403-405] [File endorsement omitted]

In United States District Court

No. 314. Civil

Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

United States of America, Defendant,

and

Interstate Commerce Commission, Intervening Defendant

Decree—Filed July 8, 1941

In this suit brought under 28 U. S. C. A. 41 (28) to enjoin and set aside an order of the Interstate Commerce Commission, a court of three judges having been convened

pursuant to the law in such case made and provided, the cause having been submitted for hearing upon final decree, and the Court having filed its opinion, findings of fact and conclusions of law, all of which are by reference made a part hereof: Now, therefore, for the reasons set forth in said opinion, findings and conclusions,

It is Ordered, Adjudged and Decreed that the plaintiff's suit be dismissed for want of equity.

Bert Emory Haney, United States Circuit Judge.
John C. Bowen, United States District Judge.
Lloyd L. Black, United States District Judge.

July 8, 1941.

[fol. 406] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 9, 1941

Now comes Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, plaintiff in the above entitled cause, by his counsel, and in connection with his appeal files the following assignments of error upon which he will rely in prosecution of his appeal to the Supreme Court of the United States from the final decree of this court entered July 8, 1941.

The District Court erred:

(1) In dismissing plaintiff's complaint and in declining to enter a decree setting aside and annulling the order of the Interstate Commerce Commission complained of, upon the ground stated in his said complaint as amended.

(2) In holding that the Commission's action in postponing, at the request of this court, the effective date of the order therein attacked, in order to permit the hearing before the three judge court prior to the final effective date, was substantial evidence that the Commission had not been arbitrary in its determination of plaintiff's applications.

(3) In holding that the decision of the United States [fol. 407] District Court for Missouri, reported as Rosenblum Truck Lines v. United States, 36 Fed. Supp. 467, was distinguishable on the ground that in the instant case plaintiff sought suspension of the Commission's order "insofar as same requires plaintiff to cease his operations as a common carrier * * *".

(4) In holding that it was necessary for plaintiff to be a common carrier from June 1, 1935, to the date "when the Commission passed upon the application."

(5) In failing to find that plaintiff sought authority before the Interstate Commerce Commission for a certificate as a common carrier or in the alternative for a permit as a contract carrier.

(6) In finding that this court should not compel deferment of the effective date of the "grandfather" application until the public convenience and necessity application (BMC 8 Application) is passed upon.

(7) In holding that the Commission's action in failing to defer the effective date of its order in the "grandfather" application while there was still pending before it a public convenience and necessity application was "a valid exercise by the Commission of its discretionary powers of which no abuse appears."

(8) In holding that it was plainly the congressional intent to permit operation under such circumstances as are shown in the instant case "during the pendency only of a 'grandfather' application."

(9) In sustaining and approving the order of the Commission complained of.

Wherefore, on account of the errors hereinbefore as- [fol. 408] signed, plaintiff prays that the said final decree of the District Court of the United States for the Western District of Washington, Northern Division, entered July 8, 1941, be reversed, and a decree rendered in favor of the plaintiff, setting aside and annulling said report and order of the Interstate Commerce Commission, dated July 2, 1940,

(subsequently presently extended to June 15, 1941) and herein complained of.

Preston, Thorgrimson, Turner, Horowitz & Stephan.
By Albert E. Stephan, Counsel for Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line.

[fols. 409-421] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 9, 1941

In the above entitled cause Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, plaintiff, having made and filed his petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered July 8, 1941, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of the court in such cases made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within sixty (60) days from the date hereof, and the clerk is directed to transmit forthwith to the United States Supreme Court a properly authenticated transcript of the record, proceedings and papers on which the final decree was made and entered.

It is further ordered that said plaintiff shall give a good and sufficient cost bond on such appeal in the sum of five hundred Dollars ($500.00) conditioned as required by law.

Dated July 9, 1941.

Presented to Hon. Lloyd L. Black, By Albert E. Stephan. Lloyd L. Black, U. S. District Judge.

[fol. 423] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 10, 1941

To the United States of America and the Interstate Commerce Commission:

Pursuant to the Urgent Deficiencies Appropriations Act of October 22, 1913, 38 Stat. 208, 221, you are hereby notified that the plaintiff Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, has taken

an appeal to the Supreme Court of the United States from the final decree entered by the District Court on July 8, 1941 in the above entitled cause, and the citation makes the appeal returnable within sixty (60) days from the date thereof.

Dated, July 10, 1941.

Preston, Thorgrimson, Turner, Horowitz & Stephan. By Albert E. Stephan, Attorneys for Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line.

[File endorsement omitted.]

[fol. 424-431] In United States District Court

[Title omitted]

Order to Transmit Original Record—Filed July 15, 1941

Pursuant to the provisions of the Act of October 22, 1913, C. 32, 38 Stat. 220, 28 U. S. C. A., Sec. 47a, providing that the District Court may direct the original record instead of a transcript thereof to be transmitted upon appeal to the Supreme Court of the United States:

It is Ordered that the original record filed in this Court in the above entitled cause, as designated in the Praecipe of counsel, be transmitted by the Clerk of this Court to the Clerk of the Supreme Court of the United States within five (5) days from the date of filing of said Praecipe.

Dated this 15th day of July, 1941.

Lloyd L. Black, United States District Judge. Presented by Albert E. Stephan.

[File endorsement omitted.]

[fol. 432] [File endorsement omitted]

[Title omitted]

In United States District Court

Condensed Statement of Proceedings at Hearing Before District Court—Filed July 22, 1941

This cause came on for hearing on Plaintiff's application for an injunction on April 14, 1941, before Circuit Judge

Bert Emory Haney and District Judges John C. Bowen and Lloyd L. Black.

Plaintiff appeared by his attorneys, Preston, Thorgrimson, Turner, Horowitz and Stephan, and Albert E. Stephan.

Defendant, the United States of America, appeared by its attorney, Frank Coleman, and Gerald Shucklin, Assistant United States Attorney.

Intervenor, Interstate Commerce Commission appeared by its attorney, Nelson Thomas.

On behalf of plaintiff, there were offered and received in evidence the following exhibits:

Exhibit 1—Report and Order of the Interstate Commerce Commission, decided July 2, 1940, 24 MCC 141, together with order of like date denying application of plaintiff.

Exhibit 2—Order of the Interstate Commerce Commission granting a compliance authorization to Pete Lubetich, dated October 16, 1937, and a subsequent order staying the compliance authorization, dated November 13, 1937.

Exhibit 3—Petition of Pete Lubetich to the Interstate Commerce Commission, dated December 17, 1940.

[fol. 433] Exhibit 4—Copy of a proposed report of joint board No. 5 of the Interstate Commerce Commission, dated February 18, 1941.

Exhibit 5—Exceptions to the proposed report of February 18, 1941.

Exhibit 6—Transcript of the record of hearing before the Interstate Commerce Commission, Docket No. MC 34383, Pete Lubetich Common Carrier Application.

On behalf of defendant, there were offered and received in evidence the following exhibits:

Exhibit A-1—Copy of Interstate Commerce Commission Form BMC 1.

Exhibit A-2—Copy of Interstate Commerce Commission Form BMC 8.

Counsel for the respective parties argued the case orally to the Court and were granted leave to file briefs, and briefs were filed. Thereupon, the Court took the case under advisement. Thereafter, on June 10, 1941, the court filed its opinion and thereafter entered the subsequent findings, conclusions, decree and orders as set forth in the record for which a praecipe is requested.

On July 8, 1941, the court convened to hear plaintiff's application for a stay pending final determination by the Supreme Court of the United States. It declined to grant such a stay and referred this matter, pursuant to the provisions of law, to a Justice of the Supreme Court of the United States.

The foregoing condensed statement of the proceedings and evidence at the hearing of this cause before the District Court is hereby tende-d, pursuant to the rules of the Supreme Court of the United States.

Preston, Thorgrimson, Turner, Horowitz & Stephan, by Albert E. Stephan, 2000 Northern Life Tower, Seattle, Washington, Attorney for Plaintiff.

July 22, 1941.

[fols. 433½-435½] Receipt of a copy of the foregoing condensed statement of the proceedings before the District Court is hereby acknowledged.

Frank Coleman, Assistant to the Attorney General of the United States and Attorney for defendant, the United States of America. Nelson Thomas, Attorney for Intervening Defendant, Interstate Commerce Commission. J. Charles Dennis, United States Attorney for the Western District of Washington, by Gerald Shucklin, Assistant United States Attorney.

[fol. 436] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR ORIGINAL RECORD—Filed July 19, 1941

Pursuant to the order of the United States District Court in the above entitled cause, entered July 15, 1941, directing that the original record as designated in the Praecipe of Counsel, be transmitted on appeal as provided in the act of October 22, 1913 c. 32; 38 Stat. 220; Title 28, U.S.C.A. Sec. 47a, please transmit within five (5) days to the Clerk of the Supreme Court of the United States the original record in the above entitled cause for the purpose of the

Appeal heretofore filed and allowed, including the following original papers and documents, to-wit:

1. Plaintiff's Complaint and Exhibits A, B, C, D and E thereto attached, filed January 8, 1941.

2. Motion of Interstate Commerce Commission for Leave to Intervene and Answer of Interstate Commerce Commission, filed February 11, 1941.

3. Answer of the United States of America, filed February 18, 1941.

4. Plaintiff's First Supplemental Complaint, filed April 4, 1941.

5. Order Granting Leave to File First Supplemental Complaint, filed April 4, 1941.

[Vol. 437] 6. Order Setting Cause for Hearing upon Petitioner's Application, filed April 4, 1941.

7. The Exhibits offered in Evidence at the hearing before the 3-Judge Court on April 14, 1941, as follows:

A. Plaintiff's Exhibit 1, Report and Order of the Interstate Commerce Commission, decided July 2, 1940, 24 MCC 141, together with order of like date denying application of plaintiff.

B. Plaintiff's Exhibit 2, being Order of the Interstate Commerce Commission granting a Compliance Authorization to Pete Lubetich, dated October 16, 1937, and a subsequent Order Staying the Compliance Authorization, dated November 13, 1937.

C. Plaintiff's Exhibit 3, being a Petition of Pete Lubetich to the Interstate Commerce Commission, dated December 17, 1940.

D. Plaintiff's Exhibit 4, being a copy of a Proposed Report of Joint Board No. 5 of the Interstate Commerce Commission, dated February 18, 1941.

(Note to Clerk: Unverified copies of Exhibits 3 and 4 were received at the hearing, subject to subsequent certification. By my letter of April 23, 1941, I transmitted to you the original certified copies to be substituted for the unverified copies originally received.)

E. Plaintiff's Exhibit 5, being his Exceptions to the Proposed Report of February 18, 1941.

F. Plaintiff's Exhibit 6, being a Transcript of the Record of Hearing before the Interstate Commerce Commission in

Docket No. MC. 34383, Pete Lubetich Common Carrier Application.

G. Defendant's Exhibit A-1, being a copy of Interstate Commerce Commission Form BMC 1.

H. Defendant's Exhibit A-2, being a copy of Interstate Commerce Commission Form BMC 8.

8. Opinion of the Court, filed June 10, 1941.

9. Findings of Fact and Conclusions of Law, filed July 8, 1941.

10. Final Decree, filed July 8, 1941.

11. Letter from Nelson Thomas, Esq., Attorney for Interstate Commerce Commission to Honorable Lloyd L. Black, United States District Judge, dated July 3, 1941, filed in this Court July 8, 1941.

[fols. 438-440] 12. Petition for Appeal filed July 9, 1941.

13. Assignment of Errors, filed July 9, 1941.

14. Statement as to Jurisdiction, filed July 9, 1941.

15. Order Allowing Appeal, filed July 9, 1941.

16. Bond for Costs on Appeal, filed July 10, 1941.

17. Notice of Appeal, filed July 10, 1941.

18. Copy of Citation on Appeal, filed July 10, 1941.

19. Statement Directing Attention to Rules of Supreme Court and Proof of Service thereof, filed July 10, 1941.

20. Order of the District Court Directing the Clerk of the said Court to Transmit to Clerk of the United States Supreme Court the original record, filed July 15, 1941.

21. Proof of Service on Honorable Francis Biddle, Solicitor General of the United States, filed July 17, 1941.

22. Notice of Appeal directed to the Attorney General of the State of Washington, and Proof of Service thereof filed July 17, 1941.

23. Notice of Appeal directed to the Attorney General of the State of Oregon, and Proof of Service thereof, filed July 17, 1941.

24. Proof of Service on Honorable W. P. Bartel, Secretary of Interstate Commerce Commission, filed July 18, 1941.

25. Condensed Statement of Proceedings at the Hearing before the District Court.

26. All appropriate Docket Entries in their proper order.

27. Praecipe for Transcript of Record.
28. Letter of Nelson Thomas of 7-23-41 re Praecipe.

Preston, Thorgrimson, Turner, Horowitz & Stephan, by Albert E. Stephan, Attorneys for Pete Lubetich, an Individual doing business as Pacific Refrigerated Motor Line.

July 19, 1941.

[fol. 441] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 442] Citation in usual form omitted in printing.

[fol. 443] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS INTENDED TO BE RELIED UPON AND DESIGNATION OF THE RECORD TO BE PRINTED—Filed July 31, 1941

I

Comes now Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, appellant, and states that in his brief and oral argument before this Court, on his appeal in the above entitled case, he will rely upon the points set forth in his assignment of errors, numbered 1, 2, 3, 4, 5, and 9.

II

In opinion of counsel for appellant, the points No. 6, 7, and 8 assigned as error in the assignment of errors, filed July 9, 1941, have been rendered moot, by virtue of a decision of the Interstate Commerce Commission, dated July 8, 1941, but not served on appellant until July 17, 1941. Said decision is reported as Interstate Commerce Commission No. MC 34383 (Sub. No. 1) Pete Lubetich Extension of Operations, — MCC — (mimeographed) decided July 8, 1941. It is the decision upon proof of public convenience and necessity to which reference was made in plaintiff's complaint, defendants' answer, and the opinion

of the court, wherein the contention is considered that the Commission committed legal error in denying the "grandfather" application, while the "public convenience and [fol. 444] necessity" application was still pending before it. However, since the Commission has subsequently decided that application, that question raised in the complaint now seems moot.

III

Appellant further states that for the foregoing reasons he will abandon the points heretofore enumerated and designated in the assignment of errors, 6 to 8, inclusive, and that the portion of the record necessary for the consideration of the points set forth above is as follows:

1. Plaintiff's complaint and exhibits A, B, C, D, and E, thereto attached. (Original Record, pp. 2-38.)

2. Answer of Interstate Commerce Commission. (Original Record, pp. 40-46.)

3. Answer of United States of America. (Original Record, pp. 48-49.)

4. Plaintiff's first supplemental complaint. (Original Record, pp. 50-52.)

5. Opinion of the Court. (Original Record, pp. 393-398.)

6. Findings of Fact and Conclusions of Law. (Original Record, pp. 399-402.)

7. Final Decree. (Original Record, p. 403.)

8. Assignment of errors. (Original Record, pp. 406-408.)

9. Jurisdictional statement. (Original Record, pp. 409-413.)

10. Order allowing appeal. (Original Record, p. 420.)

11. Notice of appeal. (Original Record, p. 423.)

12. Statement directing attention to Rule 12(3) and proof of service. (Original Record, p. 424.)

13. Order to transmit original record. (Original Record, p. 425.)

[fols. 445-446] 14. Condensed statement of proceedings before District Court. (Original Record, pp. 432-433.)

15. Certificate of Clerk of U. S. District Court to Record on Appeal. (Original Record, pp. 440-441.)

16. Citation on appeal. (Original Record, p. 442.)

17. Praecipe for original record. (Original Record, pp. 436-438.)

All of the remaining original documents transmitted by the Clerk of the District Court to the Clerk of this Court, in conformity with an order of the District Court, and praecipe of counsel, are not necessary for the consideration of the points intended to be relied upon, and should not be printed by the Clerk of this Court.

Preston, Thorgrimson, Turner, Horowitz & Stephan, by Albert E. Stephan, 2000 Northern Life Tower, Seattle, Washington, Attorney for Plaintiff.

[fol. 447] Service of this "Statement of Points to be relied upon and Designation of the Record to be Printed", is acknowledged this 28th day of July, 1941.

Frank Coleman, Special Assistant to the Attorney General for the United States of America. Nelson Thomas, Attorney, Interstate Commerce Commission, for the Interstate Commerce Commission.

[fol. 448] [File endorsement omitted.]

Endorsed on cover: Enter Albert E. Stephan, File No. 45,650, W. Washington, D. C. U. S. Term No. 322. Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line, Appellant, vs. The United States of America and Interstate Commerce Commission. Filed July 30, 1941, Term No. 322, O. T., 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 322

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

ALBERT E. STEPHAN,
Counsel for Appellant.

PRESTON, THORGRIMSON, TURNER,
HOROWITZ & STEPHAN,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions	1
Statute of a State or the statutes or treaty of the United States the validity of which is involved	2
Date of the decree and application for appeal	2
Nature of the case and rulings below	2
Cases believed to sustain the jurisdiction	5
Exhibit "A"—Opinion of the District Court	6
Exhibit "B"—Decree of the District Court	10

Table of Cases Cited.

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658	5
Beaumont, Sour Lake & Western Railway Co. v. *United States*, 282 U. S. 74	5
Florida v. *United States*, 282 U. S. 194	5
Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541	5
Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1	5
Roseblum Truck Line v. *United States*, 36 Fed. Supp. 467	4
United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454	5
United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499	5
United States v. *Lowden*, 308 U. S. 225	5

Statutes Cited.

Interstate Commerce Act, Title II:	
Section 206	4
Section 209	4
United States Code:	
Title 28, Section 41(28), as amended	2, 3
Title 28, Section 44, as amended	2
Title 28, Section 47	2
Title 28, Section 47a, as amended	1
Title 28, Section 345, as amended	2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Civil Action No. 314

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The plaintiff-appellant respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above entitled cause sought to be reviewed:

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 267, 36 Stat 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which is Involved.

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

C. Date of the Judgment or Decree Sought To Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on July 8, 1941. The petition for appeal was presented and allowed on July 9, 1941, together with an assignment of errors.

D. Nature of Case and of Rulings Below.

This is an appeal from a decree of the District Court of the United States for the Western District of Washington, Northern Division, entered July 8, 1941, denying an applica-

tion for an injunction against an order of the Interstate Commerce Commission dated July 2, 1940, in its Docket No. MC 34383, Pete Lubetich Common Carrier Application 24 MCC 141, which denied an application for a certificate or a permit to operate as a motor carrier pursuant to the so-called "grandfather" clause provisions of the Interstate Commerce Act, Title II. The complaint was filed in said court on January 8, 1941, and amended April 4, 1941, under and pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28 U. S. Code.

Said complaint as amended prayed the court find that the Commission erred in holding that the application should be denied on the theory that applicant had been engaged during a portion of the vital period in operations as an "owner-operator"; and, further, that the Commission was in error in requiring plaintiff to cease his operations prior to the time when it had determined a still pending application covering the identical territory under proof of public convenience and necessity.

The court was asked to wholly suspend the operation of the order of the defendant, Interstate Commerce Commission, and "that upon final hearing herein a decree be entered setting aside and annulling and perpetually enjoining the enforcement of said order * * * so far as same requires plaintiff to discontinue his operations as a common carrier by motor vehicles of general commodities in interstate commerce between points in Washington, Oregon and California." The case was heard on final hearing on April 14, 1941, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (Chapter 32, 38 Stat. 220). The oral testimony introduced before the Interstate Commerce Commission was received in evidence before the court, but the documentary evidence which had been offered as exhibits during the hear-

ings before the Interstate Commerce Commission was not proffered or received in evidence; the fundamental question presented was whether, under the provisions of Section 206 and 209 of the Interstate Commerce Act, Title II, the Commission has authority to deny an application when it has still pending before it another application in which full evidence of public convenience and necessity has been offered; and whether the Commission was correct, as a matter of law, in denying to applicant a certificate or permit to operate as a common or contract carrier upon the theory that during a portion of the time the applicant had performed operations as an "owner-operator". Thereafter, on June 10, 1941, the court rendered its opinion holding that the prayer of the complaint should be denied, and on July 8, 1941, said court entered the decree sought to be reviewed.

Pete Lubetich is an individual doing business as Pacific Refrigerated Motor Line. The Commission's decision heretofore referred to outlines the essential facts with respect to the operation. No question is raised as to the adequacy of the hearings upon which the Commission's report and order was based because plaintiff admits that its inability to produce the necessary copies of the documentary evidence precludes the raising of that question.

The question presented by this appeal is a substantial one. There are several other proceedings pending before the Commission involving the same question as presented by this appeal. A three-judge Federal Court sustained a complaint founded upon similar facts in *Rosenblum Truck Line* v. *United States*, 36 Fed. Supp. 467. The United States and Interstate Commerce Commission have filed their appeal in the United States Supreme Court from the court's action in that case.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541; and

United States v. *Lowden*, 308 U. S. 225.

F. Decree and Opinion of the District Court.

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said court sought to be reviewed.

We therefore respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated July 9, 1941.

Respectfully submitted,

PRESTON, THORGRIMSON, TURNER,
HOROWITZ & STEPHAN,
By ALBERT E. STEPHAN,
Counsel for Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. Civil 314.

Filed June 10, 1941.

PETE LUBETICH, an Individual Doing Business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant,

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

Before Haney, Circuit Judge, and Bowen and Black, District Judges.

BLACK, District Judge:

In plaintiff's action, as set forth in his complaint and supplemental complaint, plaintiff sought to set aside an order of the Interstate Commerce Commission denying him a "grandfather" certificate authorizing common carrier operation between points in California, Oregon and Washington upon the contention that on and prior to June, 1935 and continuously thereafter he has been engaged in a bona fide common carrier operation, and further sought in the event such "grandfather" application should be denied to have this Court require the effective date of such denial order to be deferred until the Commission shall dispose of plaintiff's BMC 8 application for a certificate of public use and necessity, which last application was filed about three years after the "grandfather" application was made.

The Commission's order denying the "grandfather" application was issued July 2, 1940 in a proceeding entitled "Pete Lubetich Common Carrier Application 24 Motor Carrier Cases 141 (the portion of the printed report referring to the Lubetich application beginning on page 147)". The first effective date of such denial order was August 10, 1940 but such effective date, at the request of plaintiff, was con-

tinued from time to time to January 10, 1941. The Commission shortly before January 10, 1941 advised that it would be willing, at the request of the Court, to further extend the effective date of the order, which upon such Court request it has extended until June 15, 1941, so as to permit the hearing before this three-judge Court prior to the final effective date.

Such consideration by the Commission is substantial evidence that it has not been arbitrary towards plaintiff, as plaintiff contends.

The evidence presented to the Commission consisted of both oral testimony and a large quantity of exhibits. Plaintiff has introduced before us a transcript of the oral testimony but such transcript failed to include the exhibits. Such exhibits are an important part of the evidence.

The plaintiff acknowledges that the failure to produce all of the evidence before the Court has heretofore been held a bar to the Court's passing upon any contention that the findings of the Commission are contrary to the evidence.

Unquestionably without bringing before the Court all the evidence considered by the Commission the plaintiff cannot question the facts found by the Commission.

> Tagg Bros. *v.* United States, 280 U. S. 420, 443-444;
> Mississippi Valley Barge Line Co. *v.* United States, 292 U. S. 282, 285-286.

In connection, therefore, with plaintiff's attempt to set aside the order denying plaintiff the "grandfather" certificate as a common carrier, the Court is only entitled to consider whether or not the ruling of the Commission was supported by the findings as made by it.

The plaintiff chiefly relies upon this phase of the case upon the decision in N. E. Rosenblum Truck Lines *v.* United States, (D. C. Mo.) 36 F. Supp. 467, in which a similar Court to this one held that that plaintiff was entitled to a "grandfather" permit as a *contract* carrier. Plaintiff's complaint and supplemental complaint are based entirely upon the contention that the Commission was in error in denying him rights as a "common carrier". Plaintiff in such pleadings only asked that the Commission's order should be suspended or set aside "insofar as same requires plaintiff to

cease his operations as a common carrier * * *." Such in any event distinguishes the Rosenblum case, supra.

Included in the findings of the Commission, 24 M. C. C., 141 at pages 147-150, we find the following:

"The operations which applicant seeks authority to continue were commenced on March 15, 1935, and were conducted over a regular route between Los Angeles and Seattle, and also over certain irregular routes. Between June 1935 and January 1938, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers, and was transported in applicant's vehicles only between the terminals of the other carriers. In January 1938 applicant engaged a solicitor of his own, established terminals, and apparently discontinued the operations previously conducted in connection with these other carriers. He now operates eight pieces of equipment, of which he owns only two. * * *

"As hereinbefore stated, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers. Prior to January 1938, applicant operated two trucks. * * *

"During the period from April 1937 until January 1938, at least, every shipment listed in applicant's exhibit purporting to prove operations was transported by applicant for Hendricks." (Referring to Hendricks Refrigerated Truck Lines, Inc., the operations of which are described in said same report under No. MC-68618) "In such instances the bills of lading were issued by Hendricks, and Hendricks employed applicant to transport the goods. * * * The tariff rates applied were those of Hendricks. * * * in fact, the evidence shows that at least during the period from April 1937 until January 1938 the only freight transported in applicant's equipment was for Hendricks, a common carrier by motor vehicle."

Although the plaintiff appears to have been a common carrier from January, 1938 to the time of the hearing, such findings of the Commission certainly support the conclusion that the plaintiff was not at all times from before the critical date of June 1, 1935 to January, 1938 a common carrier.

Under the authority of United States *v.* Maher, 307 U. S., 148, 155, it was necessary that plaintiff should be such from June 1, 1935 to the date "when the Commission passed upon the application" for a certificate under the "grandfather" clause.

Clearly, on the record before this Court, we have no authority to disturb the denial by the Commission of certificate to plaintiff under the "grandfather" clause.

The alternative contention of plaintiff is that the Court should compel deferment of the effective date of such order of denial until the BMC 8 application is passed upon.

Plaintiff's two applications constitute two separate proceedings, one of which has been finally disposed of—the other is awaiting future decision. We cannot accept plaintiff's suggestion that a BMC 8 proceeding, which plaintiff delayed instituting until three years after his application under the "grandfather" clause was made and which, in fact, was not instituted until less than ten months before the decision denying his earlier application, can be welded to and made a part of the "grandfather" proceeding so as to prevent final action upon the "grandfather" proceeding until the BMC 8 proceeding is ultimately disposed of. Under the Interstate Commerce Act the Commission is granted power to determine when its orders shall become effective. Since it had the authority to deny the "grandfather" application it could say when that order should be effective. The Supreme Court in *United States, et al.* v. *Baltimore & Ohio R. Co., et al.*, 284 U. S. 195, said:

"'Orders (referring to those of the Interstate Commerce Commission) * * * shall take effect * * * according as shall be prescribed in the order.' The courts may not usurp the function of the Commission and say one of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date, if any, is the one actually appointed, not one which might have been."

Also see *Philadelphia-Detroit Lines, Inc.* v. *United States*, 31 F. Supp. 188. This last case upon appeal was affirmed per curiam by the Supreme Court, 308 U. S. 528.

As in that case, we hold that the Commission's action in this instant case was "a valid exercise by the Commission of its discretionary powers of which no abuse appears."

To sustain plaintiff's contention upon the second phase of the case before us would give precedent for untoward results that would completely dwarf the injury plaintiff complains of.

The logic of the situation refutes plaintiff's contention. It was plainly the Congressional intent to permit operation during the pendency only of a "grandfather" application. An applicant for a BMC 8 certificate is accorded no such privilege. If it is advisable that BMC 8 applicants ought also to have the privilege of operation while awaiting decision from the Commission the request for such should be made to Congress and not to the Court.

Plaintiff's action is dismissed.

LLOYD L. BLACK,
District Judge.

We concur.

BERT EMORY HANEY,
Circuit Judge.

JOHN C. BOWEN,
District Judge.

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 314 Civil.

PETE LUBETICH, an Individual Doing Business as Pacific Refrigerated Motor Line, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

DECREE—Filed July 8, 1941

In this suit brought under 28 U. S. C. A. 41 (28) to enjoin and set aside an order of the Interstate Commerce Commis-

sion, a court of three judges having been convened pursuant to the law in such case made and provided, the cause having been submitted for hearing upon final decree, and the Court having filed its opinion, findings of fact and conclusions of law, all of which are by reference made a part hereof; Now, therefore, for the reasons set forth in said opinion, findings and conclusions,

It is Ordered, Adjudged and Decreed that the plaintiff's suit be dismissed for want of equity.

July 8, 1941.

BERT EMORY HANEY,
United States Circuit Judge.
JOHN C. BOWEN,
United States District Judge.
LLOYD L. BLACK,
United States District Judge.

No. 322

IN THE

Supreme Court of the United States

October Term, 1941

PETE LUBETICH, doing business as PACIFIC REFRIGERATED MOTOR LINE,

Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief for the Appellant

ALBERT E. STEPHAN,
2000 Northern Life Tower
Seattle, Washington
Attorney for Appellant.

PRESTON, THORGRIMSON, TURNER, HOROWITZ & STEPHAN
2000 Northern Life Tower
Seattle, Washington
Of Counsel

November, 1941

PEACOCK PRINTING SEATTLE

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	6
Summary of argument	6
Argument	8
I. The Commission's Order is contrary to law and void in that it denies to appellant appropriate authorization to continue his motor carrier operations upon the erroneous theory that because he was an "owner-operator" he therefore had ceased to be a common or contract carrier	8
II. The fact that appellant in his complaint sought primary relief against the denial of common carrier rights is without legal significance	36
III. The granting of rights as prayed conforms to Congressional intent and will not cause administrative difficulty	39
Conclusion	42

CITATIONS

CASES:

PAGE

Acme Fast Freight, Inc., Common Carrier Application, 8 M.C.C. 211 19

Atchison, T. & S. F. Ry. Co. v. United States. 284 U.S. 248, 52 Sup. Ct. 146 41

B-Line Motor Freight Common Carrier Application, 20 M.C.C. 538 ..... 21, 28

Barker v. St. Louis County (Mo.), 104 S.W. (2d) 371 (1937) 40

Bemis Brothers Bag Co. v. United States, 289 U.S. 28 38

Coast Line Express Common Carrier Application, 9 M.C.C. 427 10

Cole Teaming Co., ... M.C.C. ....., decided Sept. 19, 1941, 2 Fed. Car. Cases, par. 7855 (C.C.H.) 42

Darnell Contract Carrier Application, 2 M.C.C. 656 10

Dixie-Ohio Express Company Common Carrier Application, 17 M.C.C. 735 ..... 11, 21, 23, 24, 26

Eagle v. City of Corbin, 275 Ky. 808, 122 S.W. (2d) 798 (1938) 40

Florida v. United States, 282 U.S. 194 23

Interstate Truck Service, Inc., Common Carrier Application, 21 M.C.C. 645 ..... 23, 24, 25

Johnson v. United States and Interstate Commerce Commission (1941), ... Fed. Supp.—2 Fed. Car. Cases (C.C.H.), Par. 9628 ..... 28, 29, 30, 31

Liberty Forwarding and Distributing Company Common Carrier Application, 21 M.C.C. 495 23

Liquid Carbonic Corporation v. Goodyear Tire & Rubber Company (1941), 38 Fed. Supp. 520 ..... 7, 38

Lockhart v. Leeds (1904), 195 U.S. 427, 25 Sup. Ct. 76 ..... 7, 38

Los Angeles-Seattle Motor Frt. Com. Car. App., 24 M.C.C. 141 20

Lubetich Common Carrier Application, 24 M.C.C. 141, 147 ..... 9, 12

Lubetich Extension of Operations, ... M.C.C. ....., decided July 8, 1941 6

Maher Common Carrier Application, 3 M.C.C. 479 31

Maher v. United States, 23 Fed. Supp. 810 35

Rosenblum Contract Carrier Application, 24 M.C.C. 121 9

CASES—*Continued*:

PAGE

Rosenblum Truck Line v. U. S. (1941), 36 Fed. Supp. 467 ..... 7, 8, 9, 11, 15, 18, 19, 37
Schreiber Common Carrier Application, 26 M.C.C. 723 ..... 25, 26
Slagle Contract Carrier Application, 2 M.C.C. 127 9
Tucker Contract Carrier Application, 2 M.C.C. 335 10
Union Stock Yard & Transit Co. v. United States, 308 U. S. 213, 60 Sup. Ct. 193 27
United States v. American Trucking Association, 310 U. S. 534 30
United States v. Brooklyn Eastern Terminal, 249 U. S. 296, 39 Sup. Ct. 283 27
United States v. California, 297 U. S. 175, 56 Sup. Ct. 421 27
United States v. Chicago M. St. P. & P. R. Co., 294 U. S. 499 23
United States v. Maher, 307 U. S. 148 ..... 19, 29, 30, 31, 35

STATUTES:

Interstate Commerce Act, Part II, Section 205 (g) Motor Carrier Act, 1935, Sec. 205 (h), 49 Stat. 543, 49 U.S.C. Sec. 305 (h) 2
Sec. 203 (a) (14) 3, 16, 17
Sec. 203 (a) (15) 3, 16, 17
Sec. 203 (a) (16) 17
Sec. 203 (a) (17) 17
Sec. 203 (a) (18) 3, 13, 18
Sec. 206 (a) 4
Sec. 209 (a) 4
Sec. 211 (a) - (d) 18
Urgent Deficiencies Act, 39 Stat. 208, 28 U.S.C. Sec. 47, 47a 2

MISCELLANEOUS:

1938 Annual Report, Interstate Commerce Commission 39
1938 Special Report of Interstate Commerce Commission 19
24 Journal of the American Judicature Society 186 40
25 Journal of the American Judicature Society 55 40
Rules of Civil Procedure, Rule 54 (c) 7
von Moschzisker, "Stare Decisis in Courts of Last Resort," 37 Harvard Law Review 407 (1924) 40

IN THE

Supreme Court of the United States

October Term, 1941

No. 322

PETE LUBETICH, doing business as PACIFIC REFRIGERATED MOTOR LINE,

Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief for the Appellant

OPINIONS BELOW

The opinion of the specially constituted District Court is reported in 39 Fed. Supp. 780. (R. 36.) Its findings of fact and conclusions of law appear at R. 40-

43. The report of the Interstate Commerce Commission[1] appears in 24 M.C.C. 141, 147. (R. 7-24.) Supplemental orders of the Commission postponing, and thereafter, making the instant order effective are shown at R. 25-28.

JURISDICTION

The final decree of the District Court was entered July 8, 1941. (R. 43.) The petition for appeal was filed and allowed July 9, 1941. (R. 46.) Probable jurisdiction was noted by this Court October 13, 1941. The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 39 Stat. 208, 28 U. S. C., Secs. 47 and 47(a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, (43 Stat. 936, 28 U. S. C., Sec. 345); and by the Motor Carrier Act of 1935, Section 205 (h) (49 Stat. 543, 49 U. S. C., Section 305 (h)).

QUESTION PRESENTED

1. Whether appellant, on the facts found and reported by the Commission in its decision,[2] was entitled to a *certificate* as a common carrier by motor vehicle,

---

[1] Hereinafter termed the Commission. Italics ours in each instance unless otherwise shown.

[2] Appellant admits, for the purpose of this proceeding, the correctness of the Commission's statement of the facts contained in its report. 39 Fed. Supp. 780-781 (R. 36, 42).

or in the alternative, to a *permit* as a contract carrier by motor vehicle under the "grandfather" clause provisions of Part II of the Interstate Commerce Act.

STATUTE INVOLVED

The statute involved is Part II of the Interstate Commerce Act, otherwise known as the Motor Carrier Act, 1935, as amended, 49 Stat. 543, 49 U. S. C., Supp. I, §§ 301-327. Pertinent provisions of the statute are set forth hereinafter, together with notes showing subsequent amendment by the Transportation Act of 1940.

STATEMENT

Appellant has operated since March 15, 1935, as a motor carrier of general commodities over various regular and irregular highway routes between Washington, Oregon, and California. (R. 14.) As such he is subject to regulation by the Commission.

The Motor Carrier Act, 1935, as amended, conferred jurisdiction over motor vehicle operations in interstate commerce. Section 203(a) (14), (15) and (18) define, respectively, a "common carrier by motor vehicle", a "contract carrier by motor vehicle", and a

"broker". Section 206(a) and 209(a) provide in substance that no person shall operate as a common carrier, or as a contract carrier, respectively, unless he has a certificate or a permit to perform such operations. Both sections contain a so-called "grandfather" clause, providing in substance that if (1) the carrier was in *bona fide* operation on the statutory date (of June 1, 1935, for common carriers and July 1, 1935, for contract carriers); and if (2) the application was made within the statutory period of 120 days, (i.e., prior to February 12, 1936); and if (3) he has so continued to operate; then a certificate, or a permit, shall be issued without further proof.

The Commission has found that appellant satisfied all the legal requirements:

1. He began operations on March 15, 1935, i. e., prior to the statutory date. (R. 14.)

2. He filed his application on February 5, 1936, under the "grandfather" clause of the act on the proper Commission form (Form BMC 1, R. 30) seeking authority to continue operations *in the alternative* as a *common* or *contract* carrier by motor vehicle of general commodities. (R. 14.)

3. On October 16, 1937, the Commission issued an order finding that appellant had made appropriate application, was in bona fide operation on June 1, 1935, and had continuously operated since that time, and authorizing him to receive a *certificate* as a *common carrier* to operate over a regular route between Seattle and Los Angeles, in the

transportation of general commodities, and to serve designated intermediate and off-route points. (R. 26-7.) On November 13, 1937, this order was stayed "pending the further action of the Commission". (R. 27-8.)

Thereafter, nearly a year later on September 29-30, 1938, the Commission held a formal hearing through one of its joint boards. (R. 30.) Nearly one more year elapsed before the Joint Board issued its proposed report on August 25, 1939. (R. 30.) And nearly a third year elapsed before the Commission rendered its instant decision on July 2, 1940. (R. 7.)

That final order of Division 5 of the Commission by a two to one vote (Commissioner Lee, dissenting) denied to appellant a "grandfather" clause certificate or permit as a common or contract carrier upon the *sole* theory[3] that he was a so-called "owner-operator." (R. 18.) The legal error of this decision is the basis of appellant's attack upon the validity of the Commission's order.[4]

---

[3] The Commission expressly rejected two other contentions of protestants concerning (a) an alleged interruption, and (b) an alleged lack of *bona fides*, on the ground that "determination of * * * (these) question(s) is rendered unnecessary by our subsequent conclusion herein." (R. 15-16.)

[4] Appellant exhausted his administrative remedies before filing this complaint by seeking the Commission's reconsideration of its decision. (R. 3, "VI"; R. 32 "IV", "V"; R. 33, "2".)

SPECIFICATION OF ERRORS TO BE URGED

Appellant intends to urge assignments of error numbered 1, 2, 3, 4, 5 and 9. (R. 44-6, 52.) He acknowledges that assignments of error numbered 6, 7 and 8 are now probably rendered moot by a subsequent decision of the Commission in appellant's then pending public convenience and necessity (BMC 8) application (R. 37), decided after the filing of the instant complaint and decision of the lower court, and which granted certain limited rights to appellant as a motor carrier. *Pete Lubetich, Extension of Operations* (mimeographed) decided July 8, 1941. —MCC—.

However, the specific assignments of error present one basic question:

Did the Commission err, as a matter of law, in denying to appellant a *certificate as a common carrier, or* in the alternative, *a permit as a contract carrier,* on the theory that the services which he was performing were "not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers." (R. 18.)

SUMMARY OF ARGUMENT

Appellant contends in the following argument:

1. The Commission's order is contrary to law and void in that it denies to appellant appropriate author-

ization to continue his motor carrier operations upon the erroneous theory that because he was an "owner-operator" he therefore had ceased to be a common or contract carrier.

2. The District Court therefore erred in narrowly construing the complaint to justify dismissal of the application on the theory that the "pleadings only asked that the Commission's order be * * * set aside 'insofar as same requires plaintiff to cease his operations as a common carrier * * *' ".[5] (R. 38.)

3. The granting of rights as prayed conforms to Congressional intent and will not cause administrative difficulty.

---

[5] In the final prayer of his complaint before the District Court, appellant sought "such other and further relief as the nature of the case shall require and to this Court shall seem meet." (R. 6) In *Lockhart v. Leeds* (1904), 195 U.S. 427, 436, 25 Sup. Ct. 76, 79, this Court held that a: "* * * prayer for general relief" at the end of the complaint "upon a somewhat different theory from that which is advanced under one of the special prayers" is sufficient grounds for sustaining the complaint; cited with approval after adoption of the new Rules of Civil Procedure in *Liquid Carbonic Corporation v. Goodyear Tire & Rubber Company* (1941) 38 Fed. Supp. 520, 525; Rule 54(c).

The reason that a "somewhat different theory" is advanced, pursuant to the general prayer is that at the time of filing the complaint, January 8, 1941 (R. 1), the decision of the specially constituted District Court in *Rosenblum Truck Line v. U. S.* (1941), which advances a somewhat different theory, had not been rendered. This case reported in 36 Fed. Supp. 467 was not decided until January 14, 1941, and not publicly available until circulation of the advance sheets some months later.

ARGUMENT

I. The Commission's Order is Contrary to Law and Void in That It Denies to Appellant Appropriate Authorization to Continue His Motor Carrier Operations Upon the Erroneous Theory That Because He Was an "Owner-Operator" He Therefore Had Ceased to Be a Common or Contract Carrier.

A.

Appellant is entitled as of right and not of discretion, under the Motor Carrier Act to a certificate as a common carrier, or, in the alternative, to a permit as a contract carrier. He complied with all requirements of law necessary to receive such a certificate or permit; and has continuously thereafter so complied. The Commission, by its order of October 16, 1937 (R. 26), made a quasi-judicial determination that his operations were those of a *common carrier,* and that as such he was entitled to a *certificate* to transport general commodities between Seattle and Los Angeles. His lawful obedience to such determination does not thereafter preclude him from receiving the alternative relief which he originally sought, to-wit, a permit as a contract carrier, if under the facts and the law, he is entitled to such alternative relief. This was the theory of the *Rosenblum* case *supra,* Note 5. The fact that he is found to have transported some freight "loaded by others" as a so-called "owner-operator" does not impair the validity of his claim to a certificate or permit.

While, as we shall show, the Commission itself has taken contrary positions with respect to the status of "owner-operators," the leading authority in support of appellant's contention is the unanimous decision of a specially constituted federal court reversing an order of the Commission for exactly the reasons set forth above. *Rosenblum Truck Lines v. United States,** 36 Fed. Supp. 467. The instant lower court distinguished that case upon the ground that there the complainant sought rights as a contract carrier. This distinction is without merit. The Commission's reports in both the *Lubetich* and *Rosenblum* cases are identical to the extent that both cases recite that applicants sought in the alternative a certificate as a common carrier, or a permit as a contract carrier. 24 M.C.C. 141, 147 (R. 14, 40-43); 24 M.C.C. 121-2.

B.

The distinction between a common carrier and a contract carrier is frequently a tenuous one. *Slagle Contract Carrier Application,* 2 M.C.C. 127. The Commission itself has recognized the difficulty of determining whether a particular applicant is a common or a contract carrier and has expressly encouraged them to seek alternative rights, and has undertaken to deter-

* Now on appeal to this Court, No. 52.

mine the appropriate legal classification. In an early case, *Tucker Contract Carrier Application*, 2 M.C.C. 335, 337-8, the Commission said:

> "While the evidence establishes applicant's right to a *certificate*, his application is for a *permit*. Evidently, he thought that the contract-carrier form of authority more nearly fitted his operation. * * * *In many situations, it is not easy to determine whether a particular operation is a contract-carrier or a common-carrier service. He has filed an application on a form which we furnished him, has attended a hearing set by us, and has submitted his facts.* Under the circumstances, we are of the opinion that *it would be more in harmony with the liberal rules* which we have adopted to govern our procedure, *to grant that form of authority which the evidence shows applicant is entitled to receive, rather than to deny his application*, * * *. We shall, therefore, grant a certificate, but shall direct that its issuance be withheld for 30 days * * * to afford any * * * interested party * * * opportunity to petition for rehearing or reconsideration under our rules. In this way, we can possibly avoid any unnecessary hardship to the applicant and, at the same time, do no violence to rights of others. *Notices of hearings on applications will hereafter contain a statement to the effect that, in such cases, we will award the particular authority which the evidence shows applicants may be entitled to receive, irrespective of the form of the application or the prayer therein.*"

This same doctrine has been followed many times. *Darnell Contract Carrier Application*, 2 M.C.C. 656, 657; *Coast Line Exp. Common Carrier Application*, 9 M.C.C. 427, 430.

The Commission has used the same yardstick for common and contract carriers who were so-called owner-operators. In *Dixie-Ohio Express Company, Common Carrier Application,* 17 M.C.C. 735, 741, it held:

> "* * * *in view of the similarity of the* * * * *definition of a contract carrier* * * * *and* * * * *of a common carrier* * * * it is apparent that *the same rule should be applied in determining the grandfather rights of contract carriers, based upon the use of equipment belonging to others, as is applied in determining similar rights of common carriers.*"

True, that case held that under its particular facts, the applicant did not acquire any motor carrier rights. It will be discussed later, but is significant here as authority for identical construction by the Commission of the definition of common carriers and of contract carriers. So that if the *Rosenblum* case, *supra,* is sound law, then it has equal application whether Lubetich be considered a common carrier or a contract carrier.

C.

In the *Roseblum* case, *supra,* at 468, the Court reviews the salient facts, to determine whether the Commission's decision denying either type of authorization was legally sound. It finds on a review of those facts that the decision was not sound. The Court said:

> "*The complainants,* prior to July 1, 1935, and thereafter, *owned trucks* on which *they paid the*

vehicle license fees, which trucks were used by common carriers to transport freight between St. Louis and Chicago. The shipments went forward in the names of the common carriers, who supervised the loading and unloading of the trucks and collected the charges. *Complainants were paid an amount for each trip, dependent upon the weight of the load carried and the compensation* derived from its carriage. *Complainants carried fire, theft and collision insurance* on their equipment, and while public liability and cargo insurance were taken out in the first instance by the common carriers, the cost of such insurance was *charged to the complainants*. The cargo insurance covered only damage over the sum of $100, and *complainants* agreed with the carriers to be responsible for damage under that sum, and *were* in some instances *compelled to pay* such *losses. The drivers of the trucks were employees of complainants*, who hired, paid and discharged them. *The complainants were free to take any route* they *chose* between the designated points, and there were two or more routes available between the two cities. *The common carriers exercised no control over the routing, except to request on occasions that drivers register* at certain stations along the road. In some instances the complainants had a full load from one common carrier, and at other times they had fractional loads for one, two or more carriers on the same truck on the same trip. At no time were the trucks of complainants in the exclusive service of any common carrier."

These facts are similar to the instant *Lubetich* case, as shown exclusively by the findings of fact in the Commission's own report. (R. 7-24.)

Lubetich commenced operations on March 15, 1935,

over a regular route between Seattle and Los Angeles. (R. 14). *He owned and* ***operated*** *two trucks* (R. 15). *He held permits in his own name from the States of California, Washington, and Oregon* (R. 18). *He paid a monthly fee* to the latter state based upon the total number of miles operated therein (R. 18). *He continually maintained his respective state operating authorities and bore the cost of insurance, operating expenses, etc.* (R. 23.)[1]

Lubetich submitted an exhibit listing shipments ***transported by him*** *beginning on March* 16, 1935, *and extending to the date of the hearing.* (R. 16.) *Lubetich contends that* during the period in controversy — "April, 1937 until January, 1938" (R. 17) *he made some trips in which he did not have freight loaded by Hendricks.* (R. 17.) Between June, 1935 and January, 1938, *most,* if not all, *of the* ***traffic handled by (Lubetich)*** *was transported in (Lubetich's) vehicles only between the terminals of the* ***other*** *carriers* (R. 15). *Taylor* (found by the Commission, R.19, to be at most a broker under § 211 of the Motor Carrier Act) solicited freight from the *general public on behalf of various motor carriers, including Lubetich.* (R.20.)

[1] This sentence is derived from Com. Lee's dissenting opinion. There is, however, no dispute between the majority and minority as to the facts found. The dissent is wholly on the legal result of the facts. (R. 22-3.)

On these findings of fact, we contend the Commission erred in its legal conclusion that appellant had forfeited his rights as a *common*, or, in the alternative, a *contract* carrier.

We believe the correct principle of law was vigorously and succinctly stated by Judge Lee in his dissenting opinion to the Commission's report (R. 22-3):

> "* * * *As to the denial of* claims based on the operations of *Lubetich* and Fornaciari, *I dissent. There is no question but that these men were engaged in transportation by motor vehicle prior to and since the 'grandfather' date. Furnishing transportation was their business.* ***They were real truckers; they sat behind a wheel and not behind a desk. Here they are*** *held to have been neither common nor contract carriers, but are* ***dubbed 'owner-operators' because*** for relatively short periods, long after the effective date of the act, ***they hauled freight 'loaded' by Hendricks and Tri-State.*** The only authority relied upon by the majority is the *B-Line case,* a two-page decision in which the question was not thoroughly explored, and to which I dissented.
>
> *"Even during those periods when they are said to have acted as 'owner-operators,'* ***Lubetich*** and Fornaciari ***continually maintained*** *their respective* ***State operating authorities and*** *themselves bore the cost of* ***insurance, operating expenses, etc.*** *Moreover,* ***Lubetich*** *testifies that during this period he* ***did not confine his operations to traffic secured by Hendricks, but hauled other freight as well. No one contradicts this testimony*** *but the majority's report rejects it wholly because he submitted no documentary evidence in corroboration thereof.*

"Because Hendricks is held to be a common carrier, Lubetich and Fornaciari, who hauled freight *for* Hendricks, are now denied any rights whatever. *I believe that Congress intended that all 'grandfather' carriers for hire should be given operating authority whether they served the general public or confined their operations to hauling freight furnished by a selected shipper or by another carrier.*[*] I think *Lubetich* and *Fornaciari had rights as common or contract carriers by motor vehicle,* and that their respective successors are entitled to corresponding operating authority."[*]

---

[*] Compare *Rosenblum Truck Line v. United States*, 36 Fed. Supp. at 470:

"The statute says if they transport freight under special agreements 'directly or by a lease or any other arrangement' for compensation, they are contract carriers. *This language is broad. Congress purposely so provided.* It may be that the administrative process would be simpler *had the statute been made to read otherwise. It might have been better to further limit the number of motor carriers, but this is not for the Court to say. Congress enacted the statute; it means what it says.*

"The conclusion seems inevitable that the common carriers did not have exclusive control of and dominion over the trucks of complainants while they were engaged in the transportation business, and that the conclusion of the Commission to that effect has no substantial basis in the evidence offered.

"The prayer of the complainants will be granted to the extent of setting aside the orders entered."

---

[*] Contrary to the contention of counsel for the Government, this dissenting opinion is one upon a question of law, and obviously should be considered by a reviewing tribunal in exactly the same light that it would be were it the dissenting opinion of one of the members of a court. The whole question here is whether the majority or the minority was correct as a matter of law.

D.

It is important now to consider the definition of common and contract carriers as contained in the 1935 Act which created the "grandfather" rights. Section 203(a) provided as follows:

> "(14) The term '*common carrier by motor vehicle' means any person who* or which *undertakes, whether directly or by a lease or any other arrangement, to transport* passengers or *property,* or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, *whether over regular or irregular routes,* including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I.
>
> "(15) The term '*contract carrier by motor vehicle' means any person, not included under paragraph* (14) of this section, *who* or which, *under special and individual* contracts or *agreements, and whether directly or by a lease or any other arrangement, transports* passengers or *property* in interstate or foreign commerce *by motor vehicle for compensation.*"[10] (Italics ours.)

[10] The foregoing definitions were changed by the Transportation Act of 1940. That act was approved September 18, 1940, after the issuance of the instant order on July 2, 1940. The definition as it appears above must obviously be controlling, for it was under that definition that the Commission acted. Moreover, the Congress gave "grandfather" rights to persons defined in the 1935 Act. A change in such a definition has no greater retroactive significance than would a change in a tax statute affect the taxpayer during succeeding years.

Both the 1935 original and the 1940 revised definitions in §203 (a) are indicated in the following, wherein words which have been

Section 203 (a) further provides:

> "(16) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

No change was made in this definition by the Transportation Act of 1940. These two classifications of common and contract carriers have, therefore, continuously remained the only two classifications of public carriers. The next succeeding paragraph, §203 (a) (17) defines a "private carrier" to be one who is not engaged in transportation for compensation.

---

eliminated by the amendment are indicated by canceled type and those which have been added are indicated by italics:

"(14) The term 'common carrier by motor vehicle' means any person ~~who or which undertakes, whether directly or by a lease or any other arrangement, to transport~~ *which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of* passengers or property, or any class or classes ~~of property~~ *thereof* ~~for the general public in interstate or foreign commerce by motor vehicle~~ for compensation, whether over regular or irregular routes, ~~including such~~ *except transportation by* motor vehicle ~~operations of carriers by rail or water and of~~ *by an* express ~~or forwarding companies~~ *company* ~~except~~ to the extent that *such transportation has heretofore been* ~~these operations are~~ subject to ~~the provisions of~~ Part I, *to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.*

"(15) The term 'contract carrier by motor vehicle' means any person ~~not included under paragraph (14) of this section, who or~~ which, under ~~special and~~ individual contracts or agreements, and ~~whether directly or by a lease or any other arrangement, transports~~ *engages in the transportation (other than transportation referred to in paragraph* (14) *and the exceptions therein) by motor vehicle of* passengers or property in interstate or foreign commerce ~~by motor vehicle~~ for compensation."

Nowhere in the Act or in the Committee Reports is there any reference to so-called "owner operators."

There, is however, definite provision for "brokers" of motor transportation.

Section 203 (a) (18) provides:

> "The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who, or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation."

Section 211 (a) - (d) provides for the issuance of licenses to brokers and the regulation by the Commission of their activities in soliciting and procuring interstate shipments.[11]

The importance of the provision with respect to brokers as bearing upon the question of whether appellant is a motor carrier entitled either to a certificate or a permit was recognized in *Rosenblum v. United States,* supra, at 469, wherein the court held:

---

[11] Congress expressly omitted to provide any "grandfather" privileges for such brokers; that is, Section 211 (b) permits them to continue operations until "otherwise ordered by the Commission," but does not give them absolute rights as is the case with common and contract carriers qualifying under the "grandfather clause."

> "In thus recognizing that common and contract carriers need not contract directly with the shipping public, but that such contracts may be made through third persons, such as brokers, *Congress has shown a clear intention that licensing of carriers should not be affected by the fact that dealings were not had directly with shippers.* Nothing in the statute indicates that a carrier must deal directly with the shipper in order to be entitled to a license under the Act."

In *United States v. Maher,* 307 U. S. 148, 155, this Court said:

> "The recognized practices of an industry give life to the dead words of a statute dealing with it."

Here we are confronted with vitalizing these definitions.

In a special report of the Interstate Commerce Commission, dated February 25, 1938, addressed to the Congress, and recommending certain changes in the Act, the Commission on page 1 comments:

> "*** The average (motor carrier) operator is a 'little fellow.' Thousands of them are one-truck or two-truck operators."

In *Acme Fast Freight, Inc., Com. Car. Appn.,* 8 M.C.C. 211, 224, the Commission said:

> "The reports and statements of the proponents of the act, and the congressional proceedings, show that the provisions with respect to *the licensing of 'brokers' were intended to cover deal-*

ings which had grown up because of the nature *of the motor-carrier industry. Such carriers, especially in the trucking field, are in general very small operators, and there are many of them. It is not always easy for shippers* or travelers *to locate the carriers* best able to provide desired service. *Nor can each small carrier afford to employ its own soliciting force. Because of this situation, agencies have arisen which procure the services of motor carriers* for intended customers, *or solicit business* for groups of carriers, *upon a commission basis.* The known methods employed by some of these agencies were such that it was thought desirable that they be brought under a degree of public regulation and the act so provides."

It is an awareness of these facts which "give life to the dead words" of the statute. Not only did the Commission err in "dubbing" Lubetich an "owner-operator," but it further committed a prejudicial and fatal error in holding (R. 18):

> "The record contains certain contradictory evidence having a bearing upon *whether Hendricks was in fact operating as a broker during the period in question* ***. However, (*this*) *question*(*s*) (*is*) *not controlling* in view of the facts discussed above and need not be given further consideration herein."

We submit that most emphatically *this question was controlling.* For, if Hendricks, in his relationships with Lubetich, was a broker[11] then the motor

[11] We do not here challenge the findings of the Commission that *other* activities of Hendricks (and his successors) may justify issuance to him of a certificate as a motor carrier, *Los Angeles - Seattle Motor Freight Inc. Com. Car. Appn.*, 24 M.C.C. 141. (R. 7)

carrier operations performed by Lubetich accrue to support Lubetich's claims under the "grandfather" clause for a certificate or permit. The Commission erred as a matter of law in failing to determine whether Hendricks was such a broker.

E.

In the Commission's determination of the legal question in the Lubetich case, it relied on only one case, *B-Line Motor Freight Common Carrier Application,* 20 M.C.C. 538. That case, as stated by Commissioner Lee was "a two-page decision in which the question was not thoroughly explored." (R. 23.) The facts in that case are entirely different from those in the instant case. However, that two-page case cites *Dixie-Ohio Company Common Carrier Application,* 17 M.C.C. 735. Now that case granted certain rights to an applicant for a common carrier certificate which accrued by virtue of use of equipment leased from others. There, the Commission found (a) the arrangement was contained in written leases of the equipment; (b) the leases "for the most part do not cover special trips"; (c) the lessee paid all necessary taxes involved in the operation and provided all bonds; (d) the leased equipment had the name of the applicant on the vehicle rather than that of the "owner-operator"; (e) the "owner-operators" were not permitted to use the

equipment for any other purposes; (f) the leased equipment was registered under applicant's authority; (g) the time and place of all traffic handled was determined by applicants, and the owner-operators as well as the hired drivers received their instructions from applicant's dispatcher. *None of these facts exist here.*

Moreover, if the Commission was correct in the *Dixie-Ohio* case, in considering one of the essential determinative facts to be the name shown on the equipment, then the Commission committed further fatal error in the instant *Lubetich* case, in finding (R. 18):

> "The record contains certain contradictory evidence, having a bearing upon * * * *whether the name of applicant* or his predecessor *was carried on their* respective pieces of *equipment*. However, (this) question(s) (is) not controlling in view of the facts discussed above, and need not be given further consideration here."

Most assuredly this matter likewise was controlling in proof of appellant's independent operation throughout the entire period. The record supports this contention. The Commission's failure to make an appropriate finding was prejudicial and fatal.

F.

The instant report and order is deficient in these respects for an additional ground, that is, absence of essential quasi-jurisdictional findings, as to the broker

relationship, and the name on the vehicle, both of which are essential to a finding of control. Cf. *Florida v. United States*, 282 U. S. 194, 214-5; and *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 508, 510-511, wherein the court reversed an order of the Interstate Commerce Commission because:

> "In the end, we are left to spell out, to argue, to choose, between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency."

G.

We consider now three other recent Commission cases construing the "owner-operator" problem; and then make final reference to the *Rosenblum* case.

In *Liberty Forwarding and Distributing Company, Common Carrier Application*, 21 M.C.C. 495, the Commission denied to applicant a certificate premised upon the operations of certain so-called "owner-operators" on the theory that the "owner-operators" were themselves entitled to the rights.

In *Interstate Truck Service, Inc., Common Carrier Application*, 21 M.C.C. 645, the Commission distinguished that case from the *Dixie-Ohio* case on the ground that in the *Dixie-Ohio* case there were written leases; that *Dixie-Ohio* assumed the insurance costs, and exercised complete control over the "owner-driv-

ers." Note that in that case the Commission significantly created a different term of "owner-*driver*" rather than "owner-*operator.*" The Commission then concluded that the *Dixie-Ohio* case was not applicable for the following reasons:

> "In the instant case the 'owner-operators' are stated to have been parties to an 'oral lease,' which the evidence indicates was *not a lease* at all, *but* rather *a vague* and variable *arrangement respecting compensation* to be paid the motor vehicle owners. The evidence further indicates that there was no uniformity in the measure of such compensation. There is *no evidence that* on and prior to June 1, 1935, *applicant provided* any public liability or property damage *insurance,* or assumed any liability to the general public with respect to the operation of the vehicles it utilized. Michel did protect himself by an excess cargo insurance policy. While a few of the vehicles utilized in the operation were said to be constantly in the employ of applicant, many other such vehicles were used for a single outbound trip from the Ohio Valley, and the evidence shows that applicant had no knowledge of what operation such vehicles performed after they left the Ohio Valley.
>
> "In the *Dixie-Ohio Express Co.,* case, supra, division 5 concluded that as to the vehicles of others used by that applicant as of June 1, 1935:
>
> 'they were operated under applicant's direction and control and under its responsibility to the general public as well as to the shipper, and that applicant, as to its operations in which such vehicles were employed, was a common carrier by motor vehicle as defined in section 203 (a) (14).'

"No such conclusion is possible here because no such direction and control or responsibility to the general public is shown to have been present on the statutory date in the instant operation. Subsequent assumption of such direct control and responsibility, if it has been accomplished, (a fact not definitely established by this record) is not sufficient to bring this operation within the purview of the findings in the *Dixie-Ohio Express Co.*, case."

In *Schreiber Common Carrier Application*, 26 M.C.C. 723, 727, the Commission said:

"Applicant testified that the owner-operators operated under his entire control at all times and that he was responsible for their actions while en route. However, the record clearly shows that they may haul for any or all who desire their services when not carrying a load for him, and this and other facts of record cast considerable doubt as to the scope and extent of the supervision and control exercised by applicant over the owner-drivers which served him.

"Briefly stated, the so-called lease arrangement between applicant and owner-operators on the 'grandfather' date appears to be nothing more than an arrangement whereby applicant might avail himself of the services of the owner-operators if and when he chose so to do. The return of compensation apparently was not fixed, but varied from time to time, according to the agreement of the parties as to each trip. As hereinbefore stated, the owner-operators were not obligated to serve applicant exclusively and the record is convincing that applicant had nothing to do with their management and conduct other than such general dealings as may be necessary to in-

sure prompt connections and satisfy service. The oral agreement under which these owner-operators served applicant on the statutory date appear to relate almost exclusively to compensation for their services. From the foregoing, it is evident that the control exercised by applicant over the equipment of the owner-operators was strictly limited, and not such as was found in *Dixie-Ohio Exp. Co. Common Carrier Application,* 17 M.C.C. 735.

"On the whole, we are of opinion that * * * until applicant acquired equipment of his own * * *, his activities consisted principally in the solicitation of traffic which was transported by others under an agreement whereby applicant obtained a part of the revenue for such services of solicitation. We are unable to conclude that the vehicles employed in the transportation were operated by applicant under a lease or any other arrangement whereby the operation was performed under the complete direction and control of applicant, with full responsibility to the general public as well as to the shippers. Accordingly, the application must be denied."

It is submitted that these distinctions are of significance here. Nowhere in the instant report and order are there findings sufficient to bring the case within the rules of the *Dixie-Ohio* case, even if it be assumed that that case was rightly decided."

---

[19] Nor can these other cases be explained away by the sweeping assertion that *Stare Decisis* has no application. This contention was advanced by the Government's Reply Brief in the lower court. If not the Commission's function, then it is the Court's to give some pattern or rationale to statutory construction, which does vitalize "the dead words of the statute."

To again quote from the *Rosenblum* case, 36 Fed. Supp. 467, 469-70, wherein it concluded that the Commission had erred in denying to Rosenblum a permit on the theory that he was an owner-operator:

> "In *United States v. Brooklyn Eastern Terminal*, 249 U. S. 296, 39 S. Ct. 283, it was *held* that *the Terminal was a carrier*, though not organized or held out as such, and *though it* had not filed tariffs nor undertaken to transport property for all who applied, but *merely carried freight as agent for certain railroads* with which it had made special contracts. See also *United States v. California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567; *Union Stock Yard & Transit Co. v. United States*, 308 U. S. 213, loc. cit. 220, 60 S. Ct. 193, 84 L. Ed. 198. *It was* not the method of fixing charges, nor the parties with which complainants contracted, but *what they did, that characterized their undertaking.*
>
> "*The complainants transported freight in interstate commerce for compensation under agreements with common carriers. They actually engaged in the business of transportation.* In so doing *they provided the trucks and drivers, paid the license fees for using the highways, and assumed the responsibility for loss or damage to freight entrusted to them. This obligation they discharged both by carrying insurance and by payment of losses.* The trucks were not used exclusively by any one common carrier, but by several. Even when called by one carrier, on some occasions the use of the trucks on the particular trip was not limited to the service of that carrier, but the freight of other carriers was transported in the same truck at the same time. *These facts*

sho.: that the control of the equipment was in the hands of complainants and not in the hands of the common carriers.

* * *

"The statute says if they transport freight under special agreements 'directly or by a lease or any other arrangement' for compensation, they are contract carriers. *This language is broad. Congress purposely so provided. It may be that the administrative process would be simpler had the statute been made to read otherwise. It might have been better to further limit the number of motor carriers, but this is not for the Court to say. Congress enacted the statute; it means what it says.*"

H.

This section of the brief may be appropriately concluded with citation of a very recent decision (quoted extensively because not yet officially reported), *J. E. Johnson v. United States and Interstate Commerce Commission* (1941) — Fed. Supp. — 2 Fed. Car. Cases (C.C.H.) Par. 9628, decided by the United States District Court for the District of Oregon, September 22, 1941. That case involved an application for an injunction brought by *plaintiff as* successor, to *the same* Fornaciari, *whose rights were denied* in the same decision of the Commission herein involved. (R. 7, 18). The rights of Fornaciari, like those of appellant, were denied on authority of the *B-Line Motor Freight Common Carrier Application,* 20 M.C.C. 538 (R. 21) which case was aptly described by Commis-

sioner Lee, dissenting, as the "only authority relied upon by the majority" and "a two-page decision in which the question was not thoroughly explored." (R. 23.)

In the *Johnson* case, a three-judge Court was convened composed of Judge Haney, of the Circuit Court of Appeals, who. likewise, had participated in the *Lubetich* case. However, the two federal district judges were from the District of Oregon and had not participated in the Lubetich case.

The District Court sustained the action of the Interstate Commerce Commission by a divided court, Judge Haney writing a brief majority opinion which primarily recites the position of the Commission and concludes that the court is "required to give the administrative construction great weight" and, therefore, sustained the action of the Commission.

District Judge Fee filed a special concurring opinion in which he set forth his view of the law as determined by this Court in *United States v. Maher,* 307 U. S. 148, particularly at 155. He concluded his special concurring opinion as follows:

"* * * The Supreme Court say:

"'Congress responded to the need for regulating motor transportation through familiar administrative devises while at the same time it satisfied

the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise contraverted matters of fact.' *United States v. Maher,* 307 U. S. 148, 155.

"The announcement of this doctrine placed all the existing business which Congress sought to preserve in the spirit of fairness beyond the scope of judicial consideration by drawing about such controversies the magic circle of 'question of fact.' It may be pointed out that a consistent policy in determination of questions of fact has in reality the force of a rule of law. [Judge Fee's footnote: Especially when administrative interpretation of the statute is given great weight. See *United States v. American Trucking Ass'ns.* 310 U. S. 534, 549.]

"However, this Court without obvious rationalization cannot fail to recognize the proposition that the Supreme Court has declared that these are questions of fact and not of law, nor the axiom that upon questions of fact the judgment of the Commission is final, no matter how arbitrary the result may seem.

"Solely because a lower Court should not attempt to reverse a policy laid down by the highest tribunal, when the pronouncement is plain, I concur in the result reached by Circuit Judge Haney."

District Judge McCulloch filed a dissenting opinion, which, in our opinion, is so persuasive as to warrant setting it out in full, especially since it is not yet available in the printed advance sheets. However, before doing so we seek to comment briefly on Judge

Fee's opinion, to which reference has been made. The *Maher* case is not sound ground for sustaining the Commission's action here. In that case Maher operated on and after the statutory "grandfather" date as an anywhere-for-hire operator of a large passenger vehicle primarily transporting groups of men employed as loggers and similar groups to various destinations in Oregon and Washington. Sometime later, after the statutory date, he instituted a new daily scheduled motor bus operation over a regular route between Portland, Ore., and Seattle, Wash., although he had only previously operated to Seattle once or twice during several years. *Maher Com. Car. Appn.*, 3 M.C.C. 479-81. We believe the Commission's decision under the grandfather clause in that case was sound, as well as the appeal in this Court.

While we disagree therefore with Judge Fee's analysis of the import of the *Maher* case as requiring denial of the *Johnson* or *Fornaciari* application for injunction, we do agree with the persuasive reasons that he advances which, as a matter of initial impression, would have apparently led him to grant the injunction prayed, but for the constraint which he felt, due to his interpretation of the *Maher* case. In the forepart of his concurring opinion he said:

"The Motor Carrier Act * * * directed (the

Commission) to issue a certificate * * * (under appropriate proof under the 'grandfather' clause) * * * without further proof of public convenience and necessity. In the absence of controlling authority *these basic provisions* relating to existing businesses engaged in interstate transportation by motor carrier seem to *indicate that property rights of the existing carriers were recognized* and confirmed by these clauses of the legislation *and that the power conferred upon the commission* in respect thereto *is judicial,* rather than administrative.

"The Commission have, *however, treated such determinations as* legislative or *administrative* questions *and have by interstitial legislation established distinctions and tests* relating to these property rights *which Congress did not* expressly *authorize.* By so doing, it would seem that *the Commission have actually been influenced by their concept of public necessity and convenience* which the act expressly removes from their consideration with respect to carriers operating on June 1, 1935."

Appellant, in quoting the foregoing language, implies no criticism, direct or indirect, of the Commission. It is honest, able and diligent. But in acquiring jurisdiction, and in regulating, and fostering thousands of motor carriers, the Commission doubtless may have subconsciously been influenced by a feeling that too many carriers with "grandfather" rights would be harmful to the industry. And that is precisely Judge Fee's point. But that is a matter of legislative policy. Congress expressly conferred such rights.

For the future it expressly provided certificates of public convenience and necessity, but as to the past it expressly provided a system that created survival of the fittest. Unhappily, a great many have already failed to survive. Others have grown stronger through mergers, or in competition. It must be remembered that six years have elapsed since the Act was passed. But Congress did expressly create "property rights of the existing carriers" to continue to do in the future what they had done in the past without proof of public convenience and necessity.

One further comment of Judge Fee seems pertinent. In commenting upon the Commission's sincere but overly technical and strained construction of the definition in the Act quoted above, he said:

> "*By drawing distinctions as technical as those of* the *common law* relating to *pleadings or contingent remainders, the Commission* seem thus to *have substituted tests of administrative convenience* established after the immunizing period has passed in place of the test laid down by Congress to satisfy the dictates of fairness.
>
> "*There is no clause of the act which provides that one* who has been transporting goods in interstate commerce on and since June 1, 1935, *must have dealt directly with the shippers and himself issued bills of lading.* But the Commission were apparently influenced by their ideas that public policy required that no more than one 'grandfather' certificate should be issued for a single

operation. This determination seems to wipe out property rights of a small operation which Congress sought to preserve. * * *

"The tendency of the Commission, influenced by such considerations to eliminate the smaller or more irregular operator from the field, the seeming injustice of drawing distinctions by interstitial interpolation to serve administrative convenience, the apparent evil of permitting the Commission to extend the immunizing period for over five years and then to destroy a business existing at the date of the approval of the statute not upon a broad survey of the record of operation as a whole but upon a deviation which did not continue more than four months, the patent injustice of using a test which at the time of the event had not been called to the attention of the carrier by express terms of the governing statute nor foreshadowed by the decisions of the Commission itself are ably pointed out in the dissenting opinion of my colleague, Judge Claude McColloch."

Observing then, the construction of the *Maher* case which constrained Judge Fee to concur in the majority opinion in the presently cited *Johnson* case, we quote now, in substantially full text, the dissenting opinion of District Judge McCulloch:

"Even though it be true, as contended by counsel, that the modern decisions grant the unreviewable right to the Interstate Commerce Commission to interpret and apply the Motor Carrier Act to concrete situations, it does not follow that the Commission may exercise such power, judicial in nature, in a distinctly unjudicial manner. The statute gives 'grandfather rights' to an applicant 'if any such carrier or predecessor in interest was

in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, * * * and has so operated since that time.' *More than five years after the 'grandfather' date* the Commission ruled that, *because for a period of four months* (February-June, 1937), the first of *applicant's* two predecessors in interest *did not, in the opinion of the Commission, maintain his status as a common carrier,* applicant was not entitled to a permit. In arriving at its decision, *the Commission said it need not,* and therefore did not, *give any consideration to the carriers' operations either before or after the named period in* 1937.

"*Whether an applicant,* and his predecessors have *maintained bona fide status* as a common carrier *over a period of time is not to be determined by finding a flaw in the chain of operating title and then stopping there. Neither a title examiner nor a court in passing on title to real property would stop at a single flaw,* and say, as the Commission said here, *we need look no farther, we adjudge the title bad,* what has gone before or after is of no consequence. On the contrary, a defect in chain of title to real property would be appraised in its whole setting. So here, *the claim of right to a permit* under the Motor Carrier Act *should have been determined on the basis of the full five years operation,* not solely on the basis of a selected few months. Analogies in the law could be multiplied where determination of status is involved. I would not expect any Court in assessing conduct to hold that, because a suitor had done a particular thing that was bad, he was not entitled to have the good in his conduct considered and balanced against the bad.

"*The Motor Carrier Act,* as I said in *United States v. Maher,* 23 F. Supp., 810, 818, 307 U. S.

148, *affects the welfare of many small operators and should not be interpreted so strictly that slight deviation from perfect conduct works a loss of status.*

"I feel that *the case should be remanded* to the Commission *for consideration of the full time of operation in determining whether there was bona fide common carrier operation subsequent to the grandfather date and to the date of the hearing.*"

We admit that this is a dissenting opinion, but it is respectfully submitted that it represents good law. If it does, then by the same token appellant is likewise entitled to such a sound and fair appraisal by the Commission of his right to continue operations as a motor carrier under the provisions of the "grandfather" clause.

II. The Fact That Appellant in His Complaint Sought Primary Relief Against the Denial of Common Carrier Rights Is Without Legal Significance.

The government in its brief, in the trial court, and presumably here, will stress the fact that appellant originally emphasized the denial of rights as a common carrier and now seeks here in the alternative the restoration of rights as a contract carrier or as a common carrier. We have previously alluded to this matter at note 5 of our brief. Appellant has been engaged in motor vehicle operations since 1935. Cases previously cited indicate that there is frequently grave

doubt as to whether a particular operation falls within the general definition of a "common carrier" or of a "contract carrier" as contained in the Motor Carrier Act. Many cases have involved construction of this matter. All of these cases have cumulatively developed since passage of the Motor Carrier Act. Appellant continued to do in the years subsequent to the Motor Carrier Act that which he had done prior to the enactment of the Act. In the order of October 16, 1937 (R. 26) the Commission affirmed its conclusion that he was a common carrier. Appellant has thereafter continued operations as a common carrier. We believe that he is a common carrier and is as such entitled to rights.

However, that is a conclusion of law upon which this Court is the final arbiter. Many references have been made to the *Rosenblum* case. There on somewhat similar facts it was found that the applicant was a "contract carrier." In both cases the motor carrier sought, in the alternative, rights as a common carrier or as a contract carrier. But the Commission elected to treat his application as that of a contract carrier.

The *Rosenblum* case was decided in Missouri on January 14, 1941, after the filing of the instant complaint in Washington on January 8, 1941. Now obviously the law is a progressive thing. Clearly, the

theory of the Court below in the *Rosenblum* case was somewhat different from a part of the theory originally advanced by appellant in this case. However, that slightly different theory should not operate to preclude appellant from such relief as he is genuinely entitled.

The last paragraph of appellant's complaint was a typical general prayer, seeking "such other and further relief as the nature of the case shall require and to this Court shall seem meet." That "prayer for general relief" at the end of the complaint "upon a somewhat different theory from that which is advanced under one of the special prayers" is sufficient grounds for sustaining the complaint. *Lockhart v. Leeds,* and cases cited, *supra,* Note 5. The *Liquid Carbonic* case, *supra,* cites other Supreme Court cases affirming the fact that "the rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not." *Bemis Brothers Bag Co. v. United States,* 289 U. S. 28, 33-5.

If, therefore, this Court shall conclude on the facts that appellant is, as a matter of law, entitled to a contract carrier permit rather than the alternative prayer for a common carrier certificate, then such rights

should be granted to Lubetich pursuant to the general prayer.

III. The Granting of Rights Prayed Conforms to Congressional Intent and Will Not Cause Administrative Difficulty.

It may be presumed that appellees will urge here that if Lubetich's application is granted it will create "chaos" in administration of the Motor Carrier Act because there may be others who are similarly situated. This need not be. Obviously, the Interstate Commerce Commission had initially a problem of statutory construction. It had before it thousands of applications for motor carrier rights. 1938 *Annual Report, Interstate Commerce Commission* p. 82-3. To the best of its ability it sought to determine the rights accruing to each applicant fairly. Any aggrieved applicant had the opportunity to seek judicial review. Very few did seek judicial review. Many of these whose rights were denied have since retired from business.

There is neither economic nor legal justification for advancing the theory that to grant rights to Lubetich would result in reopening all of those prior cases.

This Court has had frequent recent occasion to consider the extent to which a new ruling by a court has

retroactive as well as prospective effect. The matter has been carefully considered by courts and by writers. See 24 Journal of the American Judicature Society 186; von Moschzisker *"Stare Decisis in Courts of Last Resort,"* 37 Harvard Law Review 407, 426; and 25 Journal of the American Judicature Society 55-6. In the last article the author said:

> "In the April, 1941, issue of the Journal (24:186), the Honorable Fred T. Hanson comments with logic and force that general employment by appellate courts of the admonitory technique in opinion writing—consisting in denial of retroactive effect to an overruling decision—well may discourage prosecution of appeals, with the undesirable consequence of denial to appellate courts of opportunity to correct erroneous lines of decision. In 1924 the same point was made with no less vigor by the Honorable Robert von Moschzisker in 'Stare Decisis in Courts of Last Resort,' 37 Harvard Law Review 409, 426, where, urging that the admonitory technique would prove nonutile, he wrote:
>
> > 'Such a method . . . must prove quite ineffective as a practical remedy, since parties would, in all probability, be unwilling to attack by litigation points already settled, when a new ruling would alter the law only prospectively, and could not be applied to their dispute.'
>
> "A solution to the mentioned problem has been provided, however, by the Courts of Missouri and Kentucky, in *Barker v. St. Louis County* (Mo.) 104 S.W. (2d) 371 (1937), and *Eagle v. City of Corbin,* 275 Ky. 808, 122 S.W. (2d) 798 (1938), in each of which cases ***the overruling decision was de-declared to have prospective effect only, except with***

respect to the appellants before the courts in those particular appeals, who were given the benefit of retroactive operation of the newly announced rule and were awarded reversals of the judgments below. *The Missouri Court expressly justified the award of retroactive operation to the appellant, Barker, on the ground that he had borne the burden of securing correction of the erroneous rule theretofore prevailing.*

"The solution provided by the cited cases admittedly is novel and somewhat of a compromise, but it also would seem to be fair, practical and useful, and if such is the case, it has much to commend it."

This doctrine is both fair and sound. Applying it to the instant case it would mean that a certificate, or in the alternative, a permit would issue to Lubetich. Similar relief would be granted to the other litigants before the Court, Rosenblum and Margolies. The case would, of course, serve as a precedent having prospective application to future determination by the Interstate Commerce Commission, but it would not have retroactive application except to the extent of other litigation now in progress involving the correct application of this principle.

The application of such a principle achieves even-handed justice to the litigants here. It overcomes any contention by the government that the Commission should be sustained merely because it might make easier administration. Compare *Atchison T. & S. F. Ry. Co. v. United States,* 284 U. S. 248, 262; 52 Sup. Ct. 146, 150 (1932).

Finally, it may be argued that if applicant should prevail here as a *contract* carrier under the grandfather clause, and continue his present separately authorized operations as a common carrier under his "B.M.C. 8" proof of public convenience, that such a situation would create "dual" operation as a common and contract carrier. Section 210 prohibits such operations unless the Commission finds it to be "consistent with the public interest." There are, however, at least two answers: (a) offer proof of such consistency; or (b) surrender the alternative rights. Compare *Cole Teaming Co.*, — M.C.C. —, decided Sept. 19, 1941, 2 Fed. Car. Cases, par. 7855 (C.C.H.) Such a bridge should be appropriately crossed when reached.

CONCLUSION

It is respectfully submitted that the decree below should be reversed and the order of the Commission set aside.

Respectfully submitted,

ALBERT E. STEPHAN,
2000 Northern Life Tower,
Seattle, Washington,
Attorney for Pete Lubetich, doing business as Pacific Refrigerated Motor Line.

PRESTON, THORGRIMSON, TURNER,
HOROWITZ & STEPHAN,
2000 Northern Life Tower,
Seattle, Washington.
Of Counsel

November, 1941.

No. 322

In the Supreme Court of the United States

OCTOBER TERM, 1941

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Argument:	
Appellant was not entitled to a common carrier certificate or a contract carrier permit because he was not a common or contract carrier throughout the period prescribed by the Act	7
Conclusion	11

CITATIONS

Cases:	
Florida v. *United States*, 282 U. S. 194	10
Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282	10
Rochester Tel. Corp. v. *United States*, 307 U. S. 125	10
Superior Forwarding Co., Inc., 28 M. C. C. 755	11
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	10
United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454	10
United States v. *Maher*, 307 U. S. 148	9
United States v. *J. B. Margolies*, No. 53, this Term	4, 7
United States v. *N. E. Rosenblum Trucks Lines, Inc.*, No. 52, this Term	4, 7
Statutes:	
Motor Carrier Act, 1935 c. 498, 49 Stat. 543:	
Sec. 206 (a) as amended	2
Sec. 209 (a)	4

430650—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 322

PETE LUBETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 36–40) is reported in 39 F. Supp. 780. The report of the Interstate Commerce Commission (R. 14–18, 22) is published in 24 M. C. C. 141 (the portion of the printed report referring to the Lubetich application beginning on page 147).

JURISDICTION

The final decree of the district court in this case was entered July 8, 1941 (R. 43). The petition for appeal was filed on July 9, 1941, and was allowed the same day (R. 44–46). Jurisdiction of this Court is based on the Urgent Deficiencies Act of October 22, 1913 (39 Stat. 208, 28 U. S. C. Secs. 47 and 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 28 U. S. C., Sec. 345); and the Motor Carrier Act, 1935, Section 205 (h)[1] (49 Stat. 543, 49 U. S. C., Sec. 305 (h)).

QUESTION PRESENTED

Whether the truck operations in which appellant was engaged on June 1, 1935, and thereafter, were those of a "common carrier by motor vehicle" or a "contract carrier by motor vehicle" as defined by the Motor Carrier Act of 1935 so as to entitle him to a certificate or permit from the Interstate Commerce Commission to operate as a common or contract carrier under the "grandfather" provisos of Sections 206 (a) and 209 (a) of the Act.

STATUTES INVOLVED

Section 206 (a) of the Motor Carrier Act of 1935 (c. 498, 49 Stat. 543), as amended by the Act

[1] This statute was applicable on July 2, 1940, the date of the Commission's order. The Transportation Act of 1940 (c. 722, 54 Stat. 898), approved September 18, 1940, rearranged this provision, without change, as Interstate Commerce Act, Part II, Section 205 (g).

of June 29, 1938 (c. 811, 52 Stat. 1236, 1238), and as amended by the Transportation Act of 1940 (c. 722, 54 Stat. 898, 923), provides in part as follows:

> *Necessity for; motor carriers in bona fide operation on June 1, 1935.*—Except as otherwise provided in this section and in section 210 (a) no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further pro-

> ceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: * * *.

Section 209 (a), applicable to contract carriers, is identical. It and other pertinent provisions of the Motor Carrier Act of 1935, applicable at the date of the Commission's order, July 2, 1940, are set forth in the Appendix to our brief in *United States* v. *N. E. Rosenblum Truck Lines, Inc.* and *United States* v. *J. B. Magolies,* Nos. 52 and 53, this Term, at pages 29–32. Amendments by the Transportation Act of 1940, approved September 18, 1940, are indicated.

STATEMENT

This is an appeal from the final decree of a specially constituted district court, convened pursuant to the Urgent Deficiencies Act of 1913,

dismissing appellant's petition to set aside an order of the Interstate Commerce Commission. The order denied appellant's application under the "grandfather" clauses of Sections 206 (a) and 209 (a) of the Motor Carrier Act of 1935 for operating authority as a "common" or "contract" carrier by motor vehicle (R. 24).

The Commission's findings show that appellant's method of operation was substantially the same as that of the appellees in Nos. 52 and 53.[2] Between June 1935 and January 1938 appellant operated two trucks under permits from the States of California, Washington, and Oregon. Most if not all of the traffic handled by appellant[3] was solicited and billed by other motor carriers and was transported in appellant's vehicles only between their terminals (R. 15). During the period from April 1937 until January 1938 the only freight transported in appellant's equipment was for Hendricks, a "common" carrier by motor vehicle (R. 17). In such instances the bills of lading were issued by Hendricks, which employed

---

[2] Appellant does not attack the sufficiency of the evidence to support the Commission's findings and that evidence is not included in the record before this Court.

[3] In this case it was the appellant's predecessor in interest who was operating on June 1, 1935. Appellant's predecessors were John and his father Pete Lubetich, who conducted operations on a family basis, allegedly as co-partners (R. 15). For the purpose of this appeal, this change in interest is unimportant, and for convenience these predecessor operations will be referred to as appellant's operations.

appellant to transport the goods, paying him on southbound loads the total revenue less 10 percent, on northbound loads the total revenue, and on "express" traffic a flat rate of eighty cents per hundred pounds (R. 17). Hendricks' tariff rates were applied (R. 17). Appellant requested loading instructions from Hendricks and reported loadings to it (R. 17). Generally Hendricks paid shippers' claims, although the amount was later charged to appellant (R. 17). In January 1938 appellant completely changed his method of operation. He engaged a tariff solicitor, established terminals, and apparently discontinued acting as owner-operator for common carriers (R. 15).

From these subsidiary findings, the Commission concluded that the service performed "was not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers" (R. 18). The Commission ruled that such operations did not entitle appellant to the operating authority sought by him and denied the application (R. 18, 24).

On January 8, 1941, appellant commenced this suit seeking to have the Commissioner's order set aside (R. 1). On June 10, 1941, the court filed its opinion (R. 36) and on July 8, 1941, entered findings of fact, conclusions of law, and a decree dismissing appellant's complaint (R. 43).

ARGUMENT

APPELLANT WAS NOT ENTITLED TO A COMMON CARRIER CERTIFICATE OR A CONTRACT CARRIER PERMIT BECAUSE HE WAS NOT A COMMON OR CONTRACT CARRIER THROUGHOUT THE PERIOD PRESCRIBED BY THE ACT

1. The instant case presents a question identical to the question in *United States* v. *N. E. Rosenblum Trucks Lines, Inc.*, No. 52, this term, and *United States* v. *J. B. Margolies*, No. 53, this term: Whether an owner-operator performing no service except to transport, under control of a common carrier, traffic solicited by the common carrier was a common or contract carrier within the meaning of Sections 206 (a) and 209 (a) of the Act. Here appellant claims a "common carrier" certificate or, in the alternative, a "contract carrier" permit, whereas in Nos. 52 and 53 the applications were for "contract carrier" permits. The difference between the cases is of no legal significance for, as pointed out in our brief in Nos. 52 and 53, the pivotal question which the Commission has to determine in each case under Sections 206 (a) and 209 (a) is whether the applicant was operating as a carrier, "contract" or "common," within the meaning of the Act prior to June 1935 and continuously thereafter to the date of the hearing.

In our brief in the *Rosenblum* case we have urged that where several applicants claim "grandfather" rights on the basis of exactly the same transportation service, only one operating au-

thority may be issued under the "grandfather" sections and it must be issued to the applicant who actually rendered the transportation service to the public and was therefore the carrier within the meaning of the Act (Br. pp. 14–18). We have also discussed the propriety of the test applied by the Commission for determining which one of several applicants is in fact the carrier, *i. e.*, which applicant actually had control over the operations in question (Br. pp. 23–25). The arguments there advanced are directly applicable to this case and need not be repeated.

2. The evidentiary findings of the Commission support its conclusion that appellant was not entitled to a certificate or permit under the grandfather sections thus interpreted. Appellant was one of three applicants seeking "grandfather" rights on the same transportation service. Separate hearings were had on each application, but all were decided in a single report (R. 8–22). One of the other applicants, Hendricks Refrigerated Truck Lines, Inc., opposed appellant's application, contending that prior to January 1938 appellant had merely been an owner-driver for it and that it was the carrier entitled to a certificate. Sustaining that contention the Commission made the findings summarized above. Particularly significant were these facts: During the period from April 1937 until January 1938 every shipment carried by appellant was carried for Hendricks (R. 17). Hendricks issued the bills

of lading (R. 17), paid appellant on the basis of total revenue minus 10 percent on southbound loads and the total revenue on northbound, and applied its own tariff rates (R. 17). At the request of appellant Hendricks gave loading instructions (R. 17) and, in the first instance, paid shippers' claims. After January 1938 appellant changed his method of operation, employed a freight solicitor, established terminals, and discontinued hauling for carriers (R. 15).

The ultimate finding of the Commission was that appellant had not established that he had been a common carrier or contract carrier by motor vehicle continuously after June 1 or July 1, 1935 (R. 22). There can be no question as to soundness of that conclusion. Not only was there no showing that appellant operated in any manner other than as an owner-operator employed and controlled by another carrier on the effective "grandfather" date, but also the recited evidentiary findings show affirmatively that from April 1937 to January 1938 appellant operated solely as an owner-operator in the employ and under the direction and control of Hendricks, which was a common carrier (R. 17) and which alone would be entitled to the certificate. If, therefore, appellant had ever engaged in any operation which would support his application, his work for Hendricks amounted to an abandonment which would defeat any claim to "grandfather" rights. *United States* v. *Maher*, 307 U. S. 148. Since the eviden-

tiary findings furnish a rational basis for the Commission's ultimate finding, the order must be sustained. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303. Appellant is not attacking the evidentiary findings and could not now do so for the evidence upon which they were made is not included in the record. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, and cases cited.

3. Appellant attacks the Commission's report on the ground that the Commission failed to find whether Hendricks was operating as a broker during the period in question and whether appellant's name was carried on the equipment. Appellant contends that the findings upon those points were "quasi jurisdictional" and that without them the order is void (Br. pp. 22–23).

The objection is unsound. Neither finding was essential to the existence of authority to enter the order and hence was not "quasi jurisdictional." See *United States* v. *Baltimore & Ohio Railroad Co.,* 293 U. S. 454, 462–463; *Florida* v. *United States,* 282 U. S. 194, 214–215. Moreover, since the Commission was satisfied by the evidence set forth in the findings summarized above that Hendricks and not appellant was the carrier in respect to the operations in which appellant was engaged, it became immaterial whether Hendricks acted as a broker in connection with some other operations.

Likewise the question whether appellant's name was carried on the equipment involved only one of the many factors which throw light on the ultimate issue which the Commission had to decide. *Superior Forwarding Co., Inc.*, 28 M. C. C. 755, 762. Where the ultimate finding of the Commission is supported by substantial evidence, its order may not be set aside for failure to exhaust inconclusive details.

CONCLUSION

It is respectfully submitted that the decree of the lower court should be affirmed.

CHARLES FAHY,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

JAMES C. WILSON,
FRANK COLEMAN,
Special Assistants to the Attorney General.

IRVIN L. STEPHENSON,
ARCHIBALD COX,
Attorneys.

DANIEL KNOWLTON,
Chief Counsel,

NELSON THOMAS,
Attorney,
Interstate Commerce Commission.

DECEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 322.—October Term, 1941.

Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line, Appellant, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Western District of Washington.

[January 19, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a companion case to No. 52, *United States* v. *N. E. Rosenblum Truck Lines, Inc.*, and No. 53, *United States* v. *Margolies*, this day decided. It is a direct appeal from the final decree of a specially constituted three-judge district court[1] dismissing appellant's petition to set aside an order of the Interstate Commerce Commission denying appellant's application under the "grandfather" clauses of Sections 206(a) and 209(a) of the Motor Carrier Act of 1935[2] for operating authority as a "common" or "contract" carrier by motor vehicle.

The Commission's findings[3] show that appellant's method of operations was substantially the same as that of appellees in the *Rosenblum* and the *Margolies* cases. Appellant operated between Los Angeles and Seattle and held permits from the States of California, Oregon, and Washington. Between June 1935 and January 1938 most, if not all, of the traffic handled by appellant was solicited and billed by other motor carriers and moved in appellant's vehicles only between the terminals of those other carriers.

[1] Convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 220, 28 U. S. C. secs. 47 and 47(a)) and Section 205(h) of the Motor Carrier Act of 1935, rearranged by the Transportation Act of 1940, 54 Stat. 899, as Section 205(g) of Part II of the Interstate Commerce Act.

[2] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

[3] Since the evidence upon which these findings were made is not included in the record before us, appellant may not here attack them. Mississippi Valley Barge Co. v. United States, 292 U. S. 282, 286, and cases cited.

From April 1937 until January 1938 appellant hauled exclusively for a single common carrier, Hendricks Refrigerated Truck Lines, Inc. The goods moved on Hendricks' bills of lading and its tariff rates were applied. Appellant requested loading instructions from, and reported loadings to, Hendricks. Appellant received the total revenue less ten percent on southbound loads and the total revenue on northbound loads. On "express" traffic he received a flat rate of eighty cents per hundred pounds. Shippers' claims generally were paid in the first instance by Hendricks and then charged back to appellant.

In January 1938 appellant engaged a solicitor of his own, established terminals and apparently discontinued the operations previously conducted in connection with other carriers.

On the basis of its findings the Commission concluded that the service performed "was not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers."[4]

While the application in the instant case is for a common carrier certificate, or, in the alternative, for a contract carrier permit, rather than for a contract carrier permit as in No. 52, *United States* v. *N. E. Rosenblum Truck Lines, Inc.* and No. 53, *United States* v. *Margolies*, that difference is without legal significance. The question in both situations is whether the applicant was a carrier, either common or contract, within the meaning of the Act prior to June 1935 and continuously thereafter to the date of the hearing. For the reasons set forth in the *Rosenblum* and *Margolies* cases, this day decided, the decision below must be affirmed.

We have considered and found without substance appellant's argument that findings as to whether Hendricks was acting as a broker during the period in question and as to whether appellant's name was carried on his equipment were "quasi jurisdictional" and that the absence of findings on those points renders the order void. Neither finding was here essential to the existence of authority to enter the order and hence was not "quasi jurisdictional". Cf. *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 462-463; *Florida* v. *United States*, 282 U. S. 194, 214-215. One of the findings of the Commission, which appellant may not attack[5] was that appellant hauled "for Hendricks, a common

[4] 24 M. C. C. 141 at 147.

[5] See Note 3, *ante*.

carrier by motor vehicle", and the Commission was satisfied from the evidence before it that Hendricks, and not the appellant, was the carrier in respect to the operations in which appellant was engaged. It was therefore immaterial whether Hendricks acted as a broker in connection with some other operations. Whether appellant's name was on his equipment can only be a factor bearing on the ultimate issue. It is in no sense "quasi jurisdictional."

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.